United States Court of Appeals

for the Second Circuit

APPENDIX

NO. 75-6119

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE TITLE GUARANTEE COMPANY, a Subsidiary of PIONEER NATIONAL TITLE INSURANCE COMPANY, a Subsidiary of TITLE INSURANCE AND TRUST COMPANY, a Subsidiary of THE TI CORPORATION (OF CALIFORNIA),

Plaintiff-Appellee,

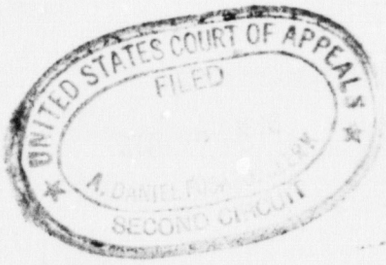
v.

NATIONAL LABOR RELATIONS BOARD,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

APPENDIX



ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board,
Washington, D.C. 20570

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

PAGINATION AS IN ORIGINAL COPY

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APPENDIX

THE TITLE GUARANTEE COMPANY, a Subsidiary of PIONEER NATIONAL TITLE INSURANCE CO., a Subsidiary of TITLE INSURANCE AND TRUST CO., a Subsidiary of the TI CORPORATION (of California)

vs.

NATIONAL LABOR RELATIONS BOARD

Civil Action No. 75-3828

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

08-5-75	(1)	Filed complaint and issued summons.
08-13-75	(2)	Filed Summons with Marshal, Return Served: National Labor Relations Bd by Pauline Trois for US Attys Office 8/6/75 #285133 Atty Gen. Wash. D.C., Certified Mail #285134
09-09-75	(3)	Filed Deft. Notice of motion re: order dismissing complaint ret. 9/23/75, 4:00 p. m.
09-09-75	(4)	Filed pltff's affdvt & notice of cross-motion for summary judgment ret. 9/23/75 4:00 p. m.
09-09-75	(5)	Filed Pltff's memorandum of law.
09-18-75	(6)	Filed Pltff's Answering Memorandum.
09-22-75	(7)	Filed Deft. Response in opposition to Pltff's Cross-Motion for Summary Judgment.
10-10-75	(8)	Filed OPINION #43242. The Board's motion to dismiss complaint or in alternative, for summary judgment is denied. Pltff's motion for summary judgment is granted to extent that Board is directed to turn over material sought by pltff for inspection & copying forthwith. The Board is enjoined from conducting any hearings in matter until such time as it complies with this decision. So ordered. Gagliardi, J (mn)

10-22-75 Filed transcript of record of proceedings, dated 10-1-75, Gagliardi, J.

10-22-75 Filed Deft. National Labor Relations Board Notice of motion for a stay of order issued against National Labor Relations Bd. on 10/10/75 pending appeal to Court of Appeals for 2nd Circuit ret. 11/4/75. 4:00 p. m.

10-22-75 Filed deft's National Labor Relations Board notice of appeal to the USCA from order entered on 10/10/75. Mailed copy to Jackson, Lewis, Schnitzler & Krupman.

12-01-75 Filed OPINION #43456. Deft's motion for a stay of this court's order dated 10/10/75 directing defts to make available forthwith material sought by the pltff & enjoining N. L. R. B. proceedings should the Board choose not to disclose the material requested by pltffs is denied. So ordered. Gagliardi, J (mn)

12-02-75 Filed 1 Brown envelope ordered and sealed and impounded to be put into vault in room 602. So Ordered. Gagliardi, J.

12-0[illegible]-75 Filed pltff-appellee's memorandum in opposition to motion of NLRB for stay.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE TITLE GUARANTEE COMPANY, A subsidiary of PIONEER NATIONAL TITLE INSURANCE COMPANY, a Subsidiary of TITLE INSURANCE AND TRUST COMPANY, a Subsidiary of THE TI CORPORATION (OF CALIFORNIA),

Plaintiff,

-v.-

NATIONAL LABOR RELATIONS BOARD,

Defendant.

CIVIL ACTION NO.
75 CIV.

COMPLAINT

Plaintiff, THE TITLE GUARANTEE COMPANY, a Subsidiary of PIONEER NATIONAL TITLE INSURANCE COMPANY, a Subsidiary of TITLE INSURANCE AND TRUST COMPANY, a Subsidiary of THE TI CORPORATION (OF CALIFORNIA), by its attorneys, Jackson, Lewis, Schnitzler & Krupman, for its Complaint against the Defendant, NATIONAL LABOR RELATIONS BOARD (hereinafter also "the Board") respectfully alleges as follows:

I. NATURE OF THE ACTION

1. This is an action under the Freedom of Information Act to require public disclosure of statements and affidavits obtained by agents of the National Labor Relations Board during the Board's investigation of an unfair labor practice charge against the Plaintiff resulting in the issuance of a Board complaint, and for injunctive relief against Board proceedings pending such disclosure.

II. JURISDICTION

2. This Court has jurisdiction of this action pursuant to the Freedom of Information Act, as amended, 5 U.S.C. §552(a)(4)(B), the Administrative Procedure Act, 5 U.S.C. §§701, et seq., and the All Writs Statute, 28 U.S.C. §1651.

III. THE PARTIES

3. Plaintiff, THE TITLE GUARANTEE COMPANY, is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of the laws of, the State of New York, with its principal offices and place of business located at 120 Broadway, in the County and State of New York.

4. Plaintiff is, and has been at all times material herein, engaged in providing title insurance and related services in the State of New York, through its various offices and places of business located within the State of New York.

5. Plaintiff is, and has been at all times material herein, a subsidiary of PIONEER NATIONAL TITLE INSURANCE COMPANY, a California corporation engaged in providing title insurance and related services, with principal offices and place of business located at 433 South Spring Street, Los Angeles, California.

6. PIONEER NATIONAL TITLE INSURANCE COMPANY is, and has been at all times material herein, a subsidiary of TITLE INSURANCE AND TRUST COMPANY, a California corporation engaged in providing title insurance and related services, with principal offices and place of business located at 433 South Spring Street, Los Angeles, California.

7. TITLE INSURANCE AND TRUST COMPANY is, and has been at all times material herein, a subsidiary of THE TI CORPORATION (OF CALIFORNIA), a California corporation with principal offices and place of business located at 433 South Spring Street, Los Angeles, California.

8. Plaintiff, THE TITLE GUARANTEE COMPANY, is a member of the public within the meaning of the Freedom of Information Act, as amended, 5 U.S.C. §552(a), and a person within the meaning of that statute, 5 U.S.C. §552(a)(3), as well as of the Administrative Procedure Act, 5 U.S.C. §551(2).

9. Defendant, NATIONAL LABOR RELATIONS BOARD, is an administrative agency of the United States Government, created

pursuant to the National Labor Relations Act, as amended, 29 U.S.C. §§151, et seq., with its principal offices located at 1717 Pennsylvania Avenue, N.W., in the City of Washington, District of Columbia.

10. Defendant Board and its agents constitute an "agency" within the meaning of the Freedom of Information Act, as amended, 5 U.S.C. §552(e).

IV. FACTUAL ALLEGATIONS

11. Upon information and belief, on or about May 28, 1975, District 65, Wholesale, Retail, Office & Processing Union, Distributive Workers of America (hereinafter "District 65"), a labor organization, filed an unfair labor practice charge with Region 2 of the Board, alleging that Plaintiff had violated §8(a)(3) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. §158(a)(3) and (1), by refusing to execute a collective bargaining agreement with District 65 which had previously been agreed upon by the parties (Case No. 2-CA-13745). A copy of this charge is annexed hereto and made a part hereof as EXHIBIT A.

12. Upon information and belief, on or about June 9, 1975, District 65 filed a First Amended Charge, against Plaintiff, alleging a violation of §8(a)(5) of the Act instead of §8(a)(3), a copy of which is annexed hereto and made a part hereof as EXHIBIT B.

13. Upon information and belief, on or about June 18, 1975, District 65 filed a Second Amended Charge against Plaintiff, a copy of which is annexed hereto and made a part hereof as EXHIBIT C.

14. Upon information and belief, from on or about May 28, 1975 through on or about June 29, 1975, agents and employees of the Board conducted an investigation of the above charge in the course of which they interviewed and took written statements and affidavits from representatives or employees of District 65, and employees of Plaintiff. Upon information and belief, such statements are presently contained in the Board case files for Case No. 2-CA-13745, now pending in Region 2.

15. On or about June 30, 1975, the Board issued Complaint and Notice of Hearing against Plaintiff herein, alleging inter alia

that since on or about May 23, 1975, Plaintiff has refused to recognize and bargain with District 65 as the exclusive collective bargaining representative of Plaintiff's employees in the unit described in the Complaint. A copy of the Complaint and Notice of Hearing is annexed hereto and made a part hereof as EXHIBIT D.

16. On July 7, 1975, Plaintiff herein requested a postponement of the hearing in Board Case No. 2-CA-13745 from September 8, 1975 to October 8, 1975.

17. By Order dated July 11, 1975, the Board's Regional Director for Region 2, SIDNEY DANIELSON, rescheduled the said hearing to October 13, 1975. A copy of such Order is annexed hereto and made a part hereof as EXHIBIT E-1.

By Order dated July 23, 1975, the hearing was further postponed to October 14, 1975 (EXHIBIT E-2).

18. On July 10, 1975, Plaintiff herein duly interposed its Answer To Complaint, denying the material allegations of the Board Complaint, and asserting as an affirmative defense that a majority of the employees in the appropriate bargaining unit employed on or after May 23, 1975, did not desire representation by District 65. A copy of Plaintiff's Answer To Complaint is annexed hereto and made a part hereof as EXHIBIT F.

19. On July 2, 1975, pursuant to the Freedom of Information Act, as amended, 5 U.S.C. §552(a), and the Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. §102.117 (c)(1), Plaintiff requested of Board Regional Director DANIELSON that copies of all written statements, signed or unsigned, contained in the Board's case files with respect to Case No. 2-CA-13745 be made available for inspection and copying by Plaintiff, and that copies of any such statements taken after the date of request also be made available to Plaintiff for such purposes. Plaintiff agreed to assume full financial liability for all charges incurred in responding to the request. A copy of Plaintiff's request is annexed hereto and made a part hereof as EXHIBIT G.

20. By letter dated July 3, 1975, Regional Director DANIELSON denied Plaintiff's request, asserting that "the statements which you have requested are privileged from disclosure under one or more of the exemptions contained in Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section 552(b) (5) and (7 (A), (C) or (D))." Regional Director DANIELSON advised, however, that review of his determination might be had pursuant to 29 C.F.R. §102.117(c)(2)(ii) by appealing to the Board's General Counsel. Regional Director DANIELSON's letter is annexed hereto and made a part hereof as EXHIBIT H.

21. On July 8, 1975, Plaintiff duly appealed the determination of Regional Director DANIELSON to the Board's General Counsel, PETER G. NASH. A copy of this appeal is annexed hereto and made a part hereof as EXHIBIT I.

22. By letter dated August 1, 1975, General Counsel NASH (by Robert E. Allen, Director, Office of Appeals) denied Plaintiff's appeal, advising Plaintiff of its right to institute a civil action under the Freedom of Information Act, as amended. Such letter is annexed hereto and made a part hereof as EXHIBIT J.

V. FURTHER ALLEGATIONS

23. Upon information and belief, all of the information sought by Plaintiff is within the provisions of the Freedom of Information Act, as amended, 5 U.S.C. §552(a) (3), and is required to be disclosed by the Defendant.

24. Defendant's failure and refusal to furnish the requested information is arbitrary and capricious, and deprives Plaintiff of public information to which it is entitled to access.

25. If Plaintiff does not receive the requested information a reasonable time prior to the hearing scheduled for October 14, 1975

in Board Case No. 2-CA-13745, Plaintiff will be wrongfully precluded from properly preparing its defense to the allegations contained in the Board's Complaint and will thereby suffer irreparable injury for which no adequate remedy at law exists.

VI. RELIEF REQUESTED

WHEREFORE, for all of the foregoing reasons, Plaintiff prays that this Court order, adjudge and decree that:

1. The information sought by Plaintiff, i.e. written statements now or hereafter contained in the N. L. R. B. 's case files with respect to The Title Guarantee Company, Case No. 2-CA-13745, constitutes public information within the meaning of the Freedom of Information Act, as amended, 5 U.S.C. §552(a), with respect to which Plaintiff is entitled to inspection and copying.
2. Defendants be enjoined from withholding such agency records from Plaintiff.
3. Defendants be required to forthwith produce for inspection and copying by Plaintiff such agency records.
4. Defendant Board and its agents be preliminarily enjoined from conducting its administrative hearing in Case No. 2-CA-13745 now scheduled for October 13, 1975, until the final resolution of the allegations contained herein.
5. Defendant Board and its agents be permanently enjoined from conducting its administrative hearing in Case No. 2-CA-13745 until a reasonable time after Defendant provides the requested statements and/or affidavits to Plaintiff.

6. Plaintiff be awarded reasonable attorneys' fees and other litigation costs reasonably incurred in this action;

and such other and further relief as to the Court may seem reasonable and proper in the circumstances.

And Plaintiff further prays that, in accordance with the Freedom of Information Act, as amended, 5 U.S.C. §552(a) (4) (D), except as to cases the Court considers of greater importance, proceedings herein take precedence on the docket over all cases and be assigned for hearing or trial or for argument at the earliest practicable date and expedited in every way.

Respectfully submitted,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
261 Madison Avenue
New York, New York 10016
Tel.: (212) 697-8200

By: /s/ Robert Lewis
Attorneys for Plaintiff

EXHIBIT A

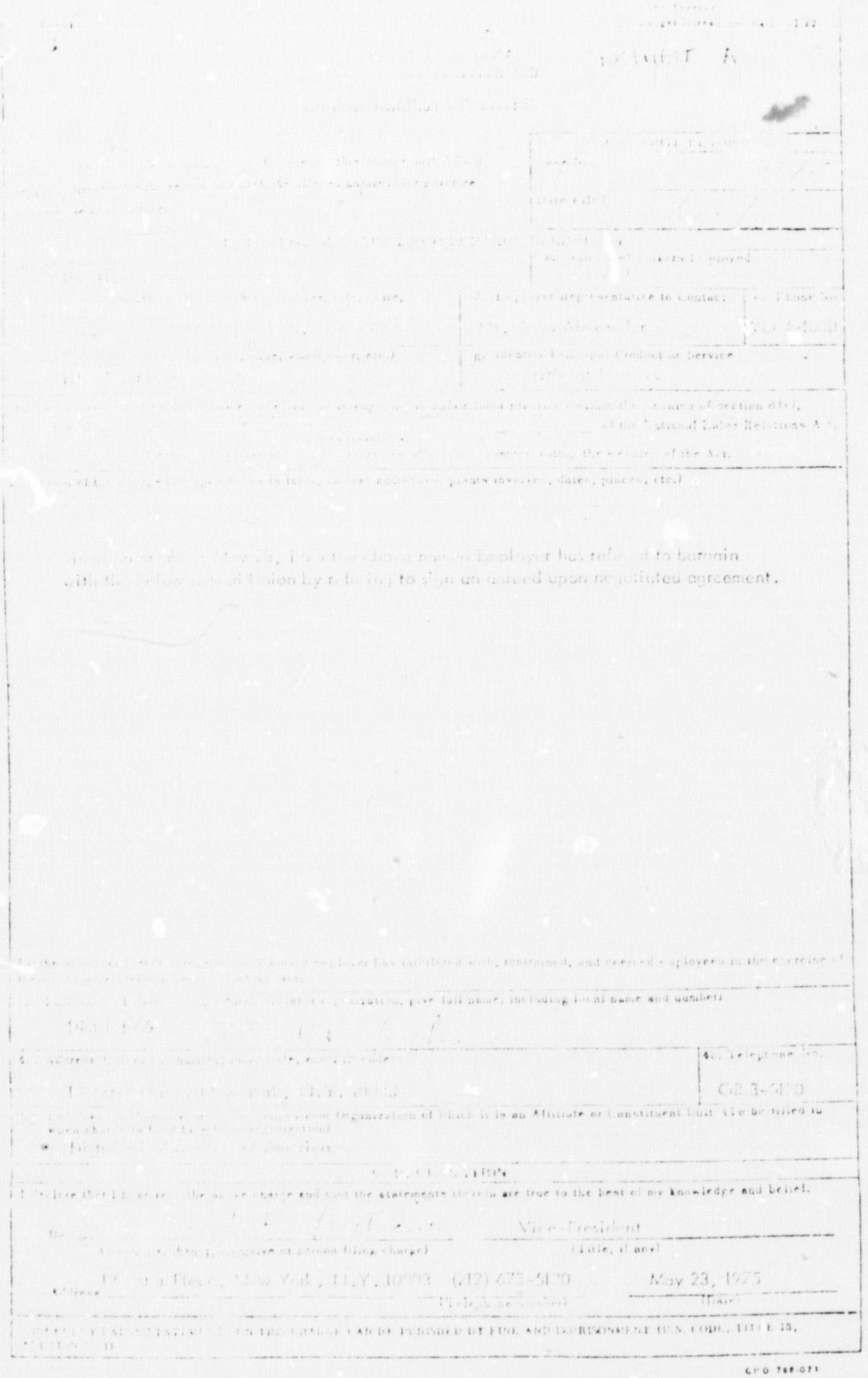

EXHIBIT A

Vice-President

(212) 473-5830

May 23, 1975

EXHIBIT B

NATIONAL LABOR RELATIONS BOARD
Region 2
Federal Building, Room 3614, 26 Federal Plaza
New York, New York 10007

June 9, 1975

The Title Guarantee Company
120 Broadway
New York, N.Y. 10038

Re: The Title Guarantee Co.

Case No.: 2-CA-13745

Gentlemen:

This is to inform you that an amended unfair labor practice charge has been filed in the above matter.

A copy of the amended charge is enclosed herewith.

The case has been assigned for investigation to the Board Agent named below. I would appreciate your cooperation in our investigation of this case by writing to this office immediately, stating your position with respect to the allegations of the amended charge, and reciting the facts as you know them.

Please submit all documents, records, memoranda, affidavits, etc., which support your position and statement of facts.

If you would like to discuss this matter before the case is processed further, please telephone the staff member assigned to the case. He will be glad to discuss the matter with you in an effort to dispose of whatever issues may be involved.

Very truly yours,

/s/ Sidney Danielson
Regional Director

REGISTERED MAIL
R.R.R.
Enclosure

Case assigned to: Mary Taylor, Esq. Telephone No. 264-0318

EXHIBIT B

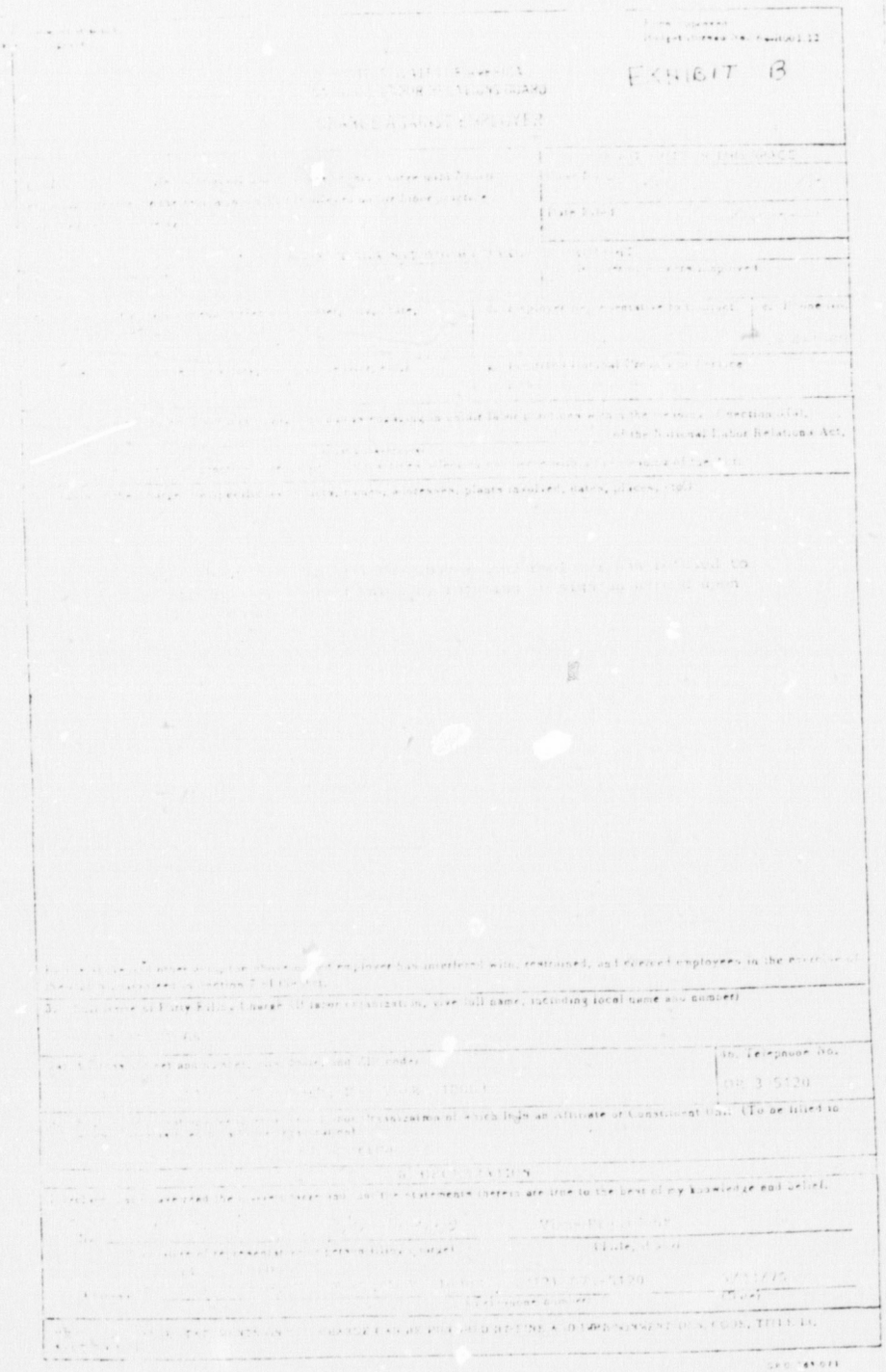

EXHIBIT C

NATIONAL LABOR RELATIONS BOARD
Region 2
Federal Building, Room 3614, 26 Federal Plaza
New York, New York 10007

June 18, 1975

The Title Guarantee Co.
120 Broadway
New York, N.Y. 10038

Re: The Title Guarantee Co.

Case No.: 2-CA-13745

Gentlemen:

This is to inform you that an amended unfair labor practice charge has been filed in the above matter.

A copy of the amended charge is enclosed herewith.

The case has been assigned for investigation to the Board Agent named below. I would appreciate your cooperation in our investigation of this case by writing to this office immediately, stating your position with respect to the allegations of the amended charge, and reciting the facts as you know them.

Please submit all documents, records, memoranda, affidavits, etc., which support your position and statement of facts.

If you would like to discuss this matter before the case is processed further, please telephone the staff member assigned to the case. He will be glad to discuss the matter with you in an effort to dispose of whatever issues may be involved.

Very truly yours,

/s/ Sidney Danielson
Regional Director

cc: Jackson, Lewis,
Schnitzler & Krupman
261 Madison Avenue
New York, N.Y. 10016
Att: Mr. Robert Lewis, Esq.

REGISTERED MAIL
R.R.R.
Enclosure

Case assigned to: Mary Taylor, Esq. Telephone No. 264-0318

EXHIBIT C

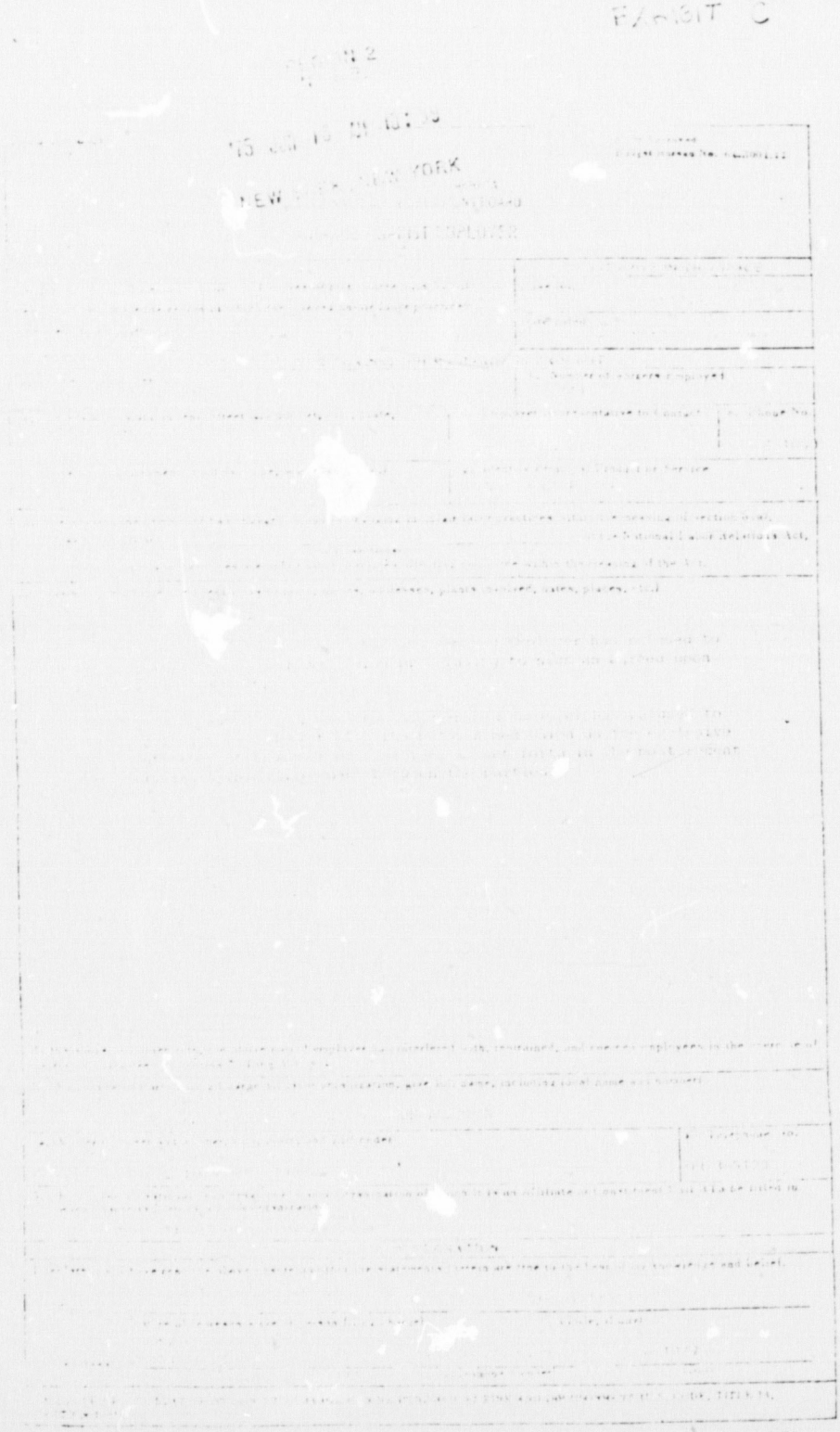

EXHIBIT D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

THE TITLE GUARANTEE COMPANY

AND

DISTRICT 65, WHOLESALE, RETAIL, OFFICE & PROCESSING UNION, DISTRIBUTIVE WORKERS OF AMERICA

CASE NO. 2-CA-13745

COMPLAINT AND NOTICE OF HEARING

It having been charged by District 65, Wholesale, Retail, Office & Processing Union, Distributive Workers of America, herein called the Union, that The Title Guarantee Company, herein called Respondent, has engaged in, and is engaging, in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U. S. C., Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director, Region 2, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations - Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. (a) The Charge in this proceeding was filed by the Union on May 28, 1975, and served by registered mail upon Respondent on or about May 29, 1975.

(b) The First Amended Charge in this proceeding was filed by the Union on June 9, 1975, and served by registered mail upon Respondent on or about June 9, 1975.

(c) The Second Amended Charge in this proceeding was filed by the Union on June 18, 1975, and served by registered mail upon Respondent on or about June 18, 1975.

2. (a) Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

(b) At all times material herein, Respondent has maintained a office and place of business at 120 Broadway, in the City

and State of New York, and various other places of business in the State of New York, where it is, and has been at all times material herein continuously engaged in providing title insurance and related services.

(c) During the past year, which period is representative of its annual operations generally, Respondent, in the course and conduct of its operations, derived gross revenues therefrom in excess of $500,000.

(d) During the past year, which period is representative of its annual operations generally, Respondent, in the course and conduct of its business, purchased and caused to be transported and delivered to its place of business, goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its place of business in interstate commerce directly from states of the United States other than the State of New York.

(e) Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

3. The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

4. All employees of the Employer in the following job titles: Messenger-Clerk, Clerk, Key Punch Operator, Jr., Record Custodian, Searcher-Office, Typist, Tracer, Porter-Handyman, Chairman, Inspector-Title, Judgement Investigator, Searcher, Stenographer, Jr., Telephone Operator, Cashier, Clerk, Senior, Inspector-Survey, Secretary-Stenographer, Transitman, Statistical Typist, Telephone Operator-Head, Key Punch Operator, Sr., Typist, Senior, Collection Assistant, Clerk-Completion, Clerk-Street Report, Examiner-Preliminary, Record Custodian-Chief, Searcher-Tax, Closer, Survey Redater, Secretary, Data Processing & Tabulating Equipment Operator, Assistant to Department Head, Closer-Senior, Examiner Final, Clerk-Accounting & Audit, Computer-Survey, Reader,

Assistant Programmer, employed in the following locations: 120 Broadway, N.Y., N.Y.,; 6 E. 45 Street, N.Y., N.Y.; 90-04 161st Street, Jamaica, N.Y.; 350 St. Marks Place, Staten Island, N.Y.; 1319 Williamsburgh Road, Bronx, N.Y.; 186 Remsen Street, Brooklyn, N.Y.; 1581 Franklin Ave., Mineola, N.Y.; 400 West Main St., Riverhead, N.Y.; 1 North Broadway, White Plains, N.Y. and 252 Main St., Goshen, N.Y. excluding President, Executive Vice President, Senior Vice President, Vice President, Assistant Vice President, Secretary, Assistant Secretary, Treasurer, Assistant Treasurer, Auditor, Assistant Auditor, Chief Counsel, Assistant Chief Counsel, Counsel, Assistant Counsel, Chief Title Officer, Title Officer, Assistant Title Officer, Department Heads, Four (4) Assistant Department Heads, Eight (8) Administrative Assistants, Customer Relations Representatives or Salesmen, Student Employees For The Period From June 1 Through Labor Day, Employees Engaged In The Personnel and Payroll Functions and Employees Designated To Be In Training For Official Positions, Assistants to the President, Assistants to the Executive Vice President, Assistants to the First Vice President and Assistants to the Chief Counsel, Secretaries and Secretaries-Stenographers to the President, Executive Vice President, Vice Presidents, Assistant Vice Presidents, Chief Title Officers, Title Officers, Chief Counsel, Assistant Chief Counsel, Treasurer and the Heads of Offices, supervisors and guards as defined by the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. On or about November 15, 1951, a majority of the employees of Respondent in the unit described above in paragraph 4, by a secret election conducted under the supervision of the Regional Director, Region 2 of the National Labor Relations Board, designated and selected the Union as their representative for the purposes of collective

bargaining with Respondent, and on or about November 26, 1951 said Regional Director certified the Union as the exclusive collective bargaining representative of the employees in said unit, and at all times since said date, the Union, by virtue of Section 9(a) of the Act, has been and is now the exclusive representative of all the employees in said unit for the purposes of collective bargaining.

6. (a) Since about 1951, Respondent and the Union have negotiated successive collective bargaining agreements covering wages, hours and other terms and conditions of employment for employees in the unit described above in paragraph 4, the last of which agreements expired on June 1, 1975.

(b) Commencing on or about February 20, 1975, Respondent and the Union met to negotiate and bargain for the terms of a new collective bargaining agreement covering the employees in the unit described above for a term following June 1, 1975.

7. Since on or about May 23, 1975 Respondent has refused to recognize the Union as the exclusive collective bargaining representative of Respondent's employees in the unit described above in paragraph 4, and has refused to bargain collectively, and continues to refuse to bargain collectively, with the Union as the exclusive bargaining representative of the employees in said unit.

8. By the acts described above in paragraph 7, and by each of said acts, Respondent interfered with, restrained and coerced, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

9. By the acts described above in paragraph 7, and by each of said acts, Respondent refused to bargain collectively and is refusing to bargain collectively with the representative of its employees, and

thereby engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

10. The acts of Respondent described above in paragraphs 7, 8 and 9, occurring in connection with the operations of Respondent described above in paragraph 2, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

PLEASE TAKE NOTICE that on the 8th day of September 1975, at 11:00 a.m. at 26 Federal Plaza, Room 3614, in the City and State of New York, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the Regional Director, Region 2, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to the said Complaint within ten (10) days from the service thereof, and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted by it to be true and may be so found by the Board. Immediately upon the filing of its answer, Respondent shall serve a copy thereof on each of the other parties.

Form NLRB-4668, Statement of Standard Procedure in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases is attached.

Dated at New York, New York this 30th day of June 1975.

/s/ Sidney Danielson
Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

EXHIBIT E-1

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter be and the same hereby is rescheduled from September 8 to October 13, 1975 at 11:00 a.m., at 26 Federal Plaza, Room 3614, N.Y.C. 10007.

DATED at New York, N.Y. this 11th day of July, 1975.

/s/ Sidney Danielson
Regional Director, Region 2
National Labor Relations Board

EXHIBIT E-2

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter be and the same hereby is rescheduled from October 13, 1975 to October 14, 1975 at 11:00 a. m., 26 Federal Plaza, Room 3614, N. Y. C.

DATED at New York, New York this 23rd day of July, 1975.

/s/ Sidney Danielson
Regional Director, Region 2
National Labor Relations Board

EXHIBIT F

ANSWER TO COMPLAINT

Respondent, The Title Guarantee Company, by its attorney Jackson, Lewis, Schnitzler & Krupman, and pursuant to Section 102.20 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, respectfully answers the Complaint herein as follows:

1) Admits the allegations contained in paragraphs 1(a), 1(b) and 1(c) of the Complaint.

2) Admits the allegations contained in paragraph 2(a) of the Complaint except asserts that the full name of the Respondent is The Title Guarantee Company, a subsidiary of Pioneer National Title Insurance Company, a subsidiary of Title Insurance and Trust Company, a subsidiary of the TI Corporation (of California). Admits the allegations contained in paragraph 2(b), 2(c), 2(d) and 2(e) of the Complaint.

3) Admits the allegations contained in paragraph 3 of the Complaint upon information and belief.

4) Admits the allegations contained in paragraph 4 of the Complaint, except asserts that the number of persons excluded as Assistants to the President, Assistants to the Executive Vice President, Assistants to the First Vice President and Assistants to the Chief Counsel, Secretaries and Secretaries-Stenographers to the President, Executive Vice President, Vice Presidents, Assistant Vice Presidents, Chief Title Officers, Title Officers, Chief Counsel, Assistant Chief Counsel, Treasurer and the Heads of Offices shall be limited to 20 in number, not more than 4 of whom shall be assigned to the President and not more than 2 of whom shall be assigned to any other enumerated officer.

5) Admits the allegations contained in paragraph 5 of the Complaint, except denies that bargaining unit described in paragraph 4 of the Complaint is the same bargaining unit which designated and selected the union as their representative for the purpose of collective bargaining on November 15, 1951, and denies that District 65, Wholesale, Retail, Office & Processing Union, Distributive Workers of America, (hereinafter District 65) is now the exclusive representative of all employees in the appropriate bargaining unit for the purpose of collective bargaining.

6) Admits the allegations contained in paragraph 6(a) of the Complaint, except denies that agreements negotiated since about 1951 were for the unit of employees described in paragraph 4 of the Complaint. Further with respect to paragraph (a), Respondent asserts that it has recognized and negotiated collective bargaining agreements with District 65 since September 18, 1944. Admits the allegations in paragraph 6(b) of the Complaint.

7) Admits the allegations contained in paragraph 7 of the Complaint but denies that the union is the exclusive bargaining representative of the employees in the appropriate bargaining unit.

8) Denies each and every allegation contained in paragraph 8 of the Complaint.

9) Denies each and every allegation contained in paragraph 9 of the Complaint.

10) Denies each and every allegation contained in paragraph 10 of the Complaint.

AFFIRMATIVE DEFENSE

11) As and for an affirmative defense, Respondent asserts that a majority of the employees in the appropriate bargaining unit employed on or after May 23, 1975 did not desire representation by District 65.

WHEREFORE, Respondent prays that the Complaint be dismissed in its entirety.

Dated: New York, New York
July 10, 1975

Respectfully submitted,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
261 Madison Avenue
New York, New York 10016
(212) 697-8200

By: /s/ Robert Lewis

Copies have been served
upon all interested parties
this 10th day of July, 1975

/s/ Gregory I. Rasm

EXHIBIT G

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
Attorneys at Law
261 Madison Avenue
New York, N.Y. 10016

July 2, 1975

HAND DELIVERED

Sidney Danielson, Esq.
Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza
New York, New York

Re: The Title Guarantee Company
Case No. 2-CA-13745

Request For Records Under The Provisions Of The Freedom Of Information Act.

Dear Mr. Danielson:

We are in receipt of the Complaint issued in the above matter, dated June 30, 1975.

Pursuant to the requirements of the Freedom of Information Act, as amended, 5. U.S.C. §552(a), and the Rules and Regulations of the National Labor Relations Board, as amended, 29 C.F.R. §102.117(c) (1), it is hereby requested that copies of all written statements, signed or unsigned, contained in the Board's case files with respect to the above matter, be made available for inspection and copying by the undersigned. It is further requested that the undersigned be notified of any such statements taken subsequent to this date and that these statements also be made available for inspection and copying.

Please be advised, pursuant to 29 C.F.R. §102.117(c) (2) (iv) (b), that the undersigned agrees to assume full financial liability for all charges which may be incurred in responding to this request.

As this request has been hand delivered this date, we ask that you respond, in accordance with the requirements of the Freedom of Information Act, 5 U.S.C. §552(a) (6) (A) (i), and the Board's Rules and Regulations, 29 C.F.R. §102.117 (c) (2) (i), no later than July 17, 1975, ten (10) working days from your receipt of this request.

Very truly yours,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN

/s/ Robert Lewis

RL/ec

EXHIBIT H

NATIONAL LABOR RELATIONS BOARD
Region 2
Federal Building, Room 3614, 26 Federal Plaza
New York, New York 10007

July 3, 1975

Jackson, Lewis, Schnitzler & Krupman
Att: Robert Lewis, Esq.
261 Madison Avenue
New York, New York 10016

Re: The Title Guarantee Company
Case No. 2-CA-13745

Dear Mr. Lewis:

This is in response to your letter dated July 2, 1975, received by this office on that date, in which you requested copies of all written statements contained in the Board's case files in connection with the above-captioned matter, be made available to you for inspection and copying. Your request must be denied. As more fully detailed below, the statements which you have requested are privileged from disclosure under one or more of the exemptions contained in Section 552(b) of the Freedom of Information Act, 5 U. S. C., Section 552(b) (5) and (7 (A), (C) or (D)).

The "complete copies of all affidavits and/or signed statements, which were obtained during the course of the Regional Director's investigation [for] those witnesses who the General Counsel anticipates calling to testify during the hearing in the above-captioned matter . . . ", which you have requested, are investigatory records privileged from disclosure by exemption (7 (A), (C), and (D)) of Section 552(b) of the Freedom of Information Act. Exemption (7 (A) exempts from disclosure investigatory records where disclosure thereof would interfere with enforcement proceedings. In the Board's processing of cases, much information is obtained from individuals who would be reluctant or would refuse to supply such information if it were routinely disclosable pursuant to a request under the Freedom of Information Act. In the administration of the National Labor Relations Act, the Board must be able to obtain in its investigations all potentially relevant information. The protection of the identities of individuals and the substance of the information which they submit during the Board's

investigation is an important means for assuring the agency's continuing ability to obtain such relevant information. If the Board were forced to disclose information submitted or obtained during the investigation of a case, other than in those circumstances provided in Section 102.118(b) of its Rules and Regulations, it would substantially deter voluntary cooperation, hinder obtaining information from all potential sources, and consequently, substantially interfere with present and future enforcement proceedings. Cf. N.L.R.B. v. Scrivener, 405 U.S. 117; N.L.R.B. v. Golden Age Beverage Co., 415 F. 2d 26.

Moreover, disclosure of the material which you have requested is inimicable to the adversarial process and would do violence to the historic privilege against disclosure of an attorney's work product. See, N.L.R.B. v. Sears Roebuck and Co., (April 28, 1975) 89 LRRM 2001; Hickman v. Taylor, 329 U.S. 495 (1946); Frankel v. Securities and Exchange Commission, 460 F. 2d 813, 817.

Also, since these statements contain matter personal to the individuals supplying the statements and to the individuals referred to in those statements, they are exempt from disclosure under exemption (7)(C). This exemption protects the personal privacy of individuals submitting statements and individuals named therein, and requires the balancing of their interests in privacy against the interest of a requesting party, such as yourself. Since you have submitted no consideration which would, I find, overcome the privacy rights of these individuals, their right of privacy must prevail.

The requested statements are also within exemption (7)(D) because their disclosure would reveal the identities of a confidential source, i.e., an individual who provides information under an express assurance of confidentiality, or in circumstances from which such assurances can reasonably be inferred. As noted above, individuals giving statements to the Board during the course of an investigation are advised and assured that their statements will remain confidential, except as provided by Section 102.118 of the Board's Rules and Regulations. This policy of protecting confidential sources of information has been consistently followed in the administration of the National Labor Relations Act and is well known to those persons dealing with this agency. Accordingly, since the individuals furnishing statements in the instant case are confidential sources, exemption (7)(D) authorizes our refusal to supply the requested statements which would identify these individuals.

Further, the deletion of names from these statements would not preserve the interests recognized by exemptions (7)(A), (C), and (D)

since disclosure of the material contained therein would, itself, constitute invasion of personal privacy, reveal confidential sources, and, consequently interfere with enforcement proceedings under the considerations set forth above. Moreover, the considerations for nondisclosure set forth herein are particularly compelling with respect to statements by, or concerning employees of, the respondent-employer in this proceeding. Deletion of portions sufficient to prevent an unwarranted invasion of personal privacy or prevent disclosure of confidential sources would result in a record so fragmented as to be incoherent and not responsive to your request.

The undersigned is responsible for the determination that the statements you have requested are privileged from disclosure under the Freedom of Information Act.

You may obtain a review of that determination under the provisions of Section 102.117(c) (2) (ii) of the Board's Rules and Regulations by filing an appeal with the General Counsel, National Labor Relations Board, Washington, D. C. 20570, within 20 days (excluding Saturdays, Sundays, and legal holidays) from the receipt of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Very truly yours,

/s/ Sidney Danielson
Regional Director

EXHIBIT I

July 8, 1975

CERTIFIED NO. 876514
AIR MAIL/SPECIAL DELIVERY

The Honorable Peter Nash
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D. C.

Re: The Title Guarantee Company
Case No. 2-CA-13745

Appeal from Denial of Request Records Pursuant to Freedom of Information Act.

Dear Sir:

Pursuant to 29 C. F. R. §107.117(c) (2) (ii) of the Board's Rules and Regulations, as amended, the undersigned hereby appeals from the denial by the Regional Director for Region 2, dated July 3, 1975, of the undersigned's request for inspection and copying of documents. Copies of the request and denial are annexed hereto.

The basis for this appeal is that the Regional Director has erroneously relied on the permissive exemptions of 5 U. S. C. §552 (b) (5) and (7) (A) (C) and (D) to deny disclosure of the items specified in our request. None of the materials sought fall within those narrow statutory exemptions. Furthermore, the Regional Director has failed to specifically identify the documents in question, describe their contents, and demonstrate why, as to each item denied, a specific exemption applies. It is the Government's burden to prove that a specific document falls within one or more exemption. This burden has not been met. It is not met by a broad assertion that a general type of document automatically qualifies for exemptions under one or more of the provisions of §552 (b).

In addition, the Regional Director has failed to show why sanitized copies or portions of documents cannot be made available so as

to comply with the Freedom of Information Act disclosure requirements, while protecting any asserted interest in confidentiality. He merely asserts that providing a portion of the statements requested "would result in a record so fragmented as to incoherent and not responsive to your request." It is not for the Regional Director to determine that portions of records which he admits are disclosable should not be made available because they would be, in his opinion, fragmented or incoherent. It is his burden to provide these portions.

To the extent that you may believe that any of these documents are within the exemptions of 5 U. S. C. §552(b), we request that you nevertheless waive the exemptions pursuant to 29 U. S. C. §102. 118, to assure that our client, The Title Guarantee Company, is not deprived of its rights before the Agency in NLRB Case No. 2-CA-13745.

Please be advised that we continue to agree to assume full financial liability for the direct cost of document search and duplication in compliance with the Freedom of Information Act, and as required by 29 C. F. R. §102. 117(c) (2) (iv) (B).

Thank you for your prompt attention to this matter.

Very truly yours,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN

Robert Lewis

RL:ja

cc: Sidney Danielson, Esq.

EXHIBIT J

NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel
Washington, D.C. 20570

August 1, 1975

Re: The Title Guarantee Co.
Case No. 2-CA-13745

Robert Lewis, Esquire
Jackson, Lewis, Schnitzler
and Krupman
261 Madison Avenue
New York, New York 10016

Dear Mr. Lewis:

Your appeal from the Regional Director's refusal to furnish information requested in your letter of July 2, 1975, has been considered.

The appeal is denied substantially for the reasons set forth in the Regional Director's letter of July 3, 1975. Concerning your contention that this Agency must disclose affidavits from which confidential material can be deleted, it should be noted that Congress had a two-fold purpose in enacting exemption 7 of the Freedom of Information Act (hereinafter, the "FOIA"), 5 U.S.C. Section 552(b)(7). See Frankel v. S.E.C., 460 F.2d 813, 817 (C.A. 2, 1972). The purposes enumerated by the Court were to keep confidential the procedures by which the Agency conducts its investigations and by which it has obtained information as well as to prevent the premature disclosure of the results of an investigation so that the Government can present its strongest case in court. Both of these forms of confidentiality were deemed necessary by the Court for effective law enforcement. In this regard, see also N.L.R.B. v. Sears, Roebuck and Company, 95 S. Ct. 1504, n. 28 and Wellman Industries, Inc., v. N.L.R.B., 490 F.2d 427 (C.A. 4, 1974). Moreover, both Frankel, supra, and Wellman, supra, make it clear that the FOIA was not intended to give parties indirectly any earlier or greater access to investigatory files than they would have directly in litigation with the Agency and it is clear

that this Agency, with the approval of the Court of Appeals for the Second Circuit, would not permit such pre-trial discovery. N.L.R.B. v. Interboro Contractors, Inc., 432 F.2d 855, 857-860 (C.A., 1970), cert. denied, 402 U.S. 915.

The undersigned, Robert E. Allen, at the direction of and pursuant to the policies established by, General Counsel Peter G. Nash, is responsible for the determination that the records you requested are priviledged from disclosure under the Freedom of Information Act.

Judicial review of this determination may be obtained by filing a complaint in the district court of the United States in the district in which the complaintant resides, or has his place of business, or in which the records are situated, or in the District of Columbia, as provided in the FOIA, 5 U.S.C. Section 552(a)(4)(B).

Very truly yours,

Peter G. Nash
General Counsel

By /s/ Robert E. Allen
Director, Office of Appeals

cc: Director, Region 2

[Attorneys names omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE TITLE GUARANTEE COMPANY, a Subsidiary of PIONEER NATIONAL TITLE INSURANCE COMPANY, a Subsidiary of TITLE INSURANCE AND TRUST COMPANY, a Subsidary of THE TI CORPORATION (OF CALIFORNIA),

Plaintiff,

v.

NATIONAL LABOR RELATIONS BOARD,

Defendant.

Civil Action No. 75-3828

OPPOSITION TO REQUEST FOR INJUNCTIVE RELIEF AND MOTION TO DISMISS COMPLAINT, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, defendant herein moves to dismiss the complaint on grounds that it fails to state a claim upon which relief can be granted.

Alternatively, defendant requests that summary judgment be entered in their favor pursuant to Rule 56, Federal Rules of Civil Procedure.

WHEREFORE, defendant respectfully requests that its motion to dismiss, or, in the alternative, for summary judgment, be granted.

Respectfully submitted,

Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board

Dated at Washington, D.C. this 5th day of September, 1975.

By /s/ Abigail Cooley

Assistant General Counsel for
Special Litigation
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570
Telephone: (202) 254-9221
Co-counsel: Joseph Norelli (Ext. 9397)
and
Winifred D. Morio, Regional Attorney
Region 2, N.L.R.B.
26th Floor Federal Building
26 Federal Plaza
New York, N.Y. 10007
Telephone: (212) 264-0332

STATEMENT OF MATERIAL FACTS AS
TO WHICH THERE IS NO
GENUINE ISSUE

1. On May 28, 1975, District 65, Wholesale, Retail, Office and Processing Union, Distributive Workers of America (hereafter "the Union") filed an unfair labor practice charge (Complaint, Exh. A) in Region Two of the National Labor Relations Board (hereafter "the Board").

2. The case was investigated by the Regional Office and on June 30, 1975, Sidney Danielson, Regional Director of Region Two, issued a complaint (Complaint, Exh. D) alleging violations of the National Labor Relations Act (hereafter "the Act"). Pursuant to a request for postponement filed by plaintiff Title Guarantee Co. (hereafter "the Company"), the hearing on the above allegations was rescheduled from September 8, 1975 to October 13, 1975 (Complaint, Exh. E-1). Thereafter, the hearing was further postponed until October 14, 1975 (Complaint, Exh. E-2).

3. By letter of July 2, 1975, to the Regional Director of Region Two, the Company requested, pursuant to the Freedom of Information Act, 5 U.S.C. §552, as amended, 88 Stat. 1563 (hereafter "the FOIA") that "copies of all written statements, signed or unsigned, contained in the Board's case files . . . be made available for inspection and copying" and that "any such statements taken subsequent to [that] date . . . also be made available" (Complaint, Exh. G).

4. Regional Director Sidney Danielson, by letter of July 3, 1975, denied the Company's request on grounds that the information was privileged from disclosure by Exemptions 5 and 7(A), (C), and (D) of the FOIA (Complaint, Exh. H).

5. The Company filed an appeal from this denial with the General Counsel, dated July 8, 1975 (Complaint, Exh. I).

6. On August 1, 1975, the General Counsel denied the appeal for substantially the reasons set forth by Regional Director Danielson (Complaint, Exh. J).

Respectfully submitted,

Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board

Dated at Washington, D.C. this 5th day of September, 1975.

By /s/ Abigail Cooley

Assistant General Counsel for
Special Litigation
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570
Telephone: (202) 254-9221

Co-counsel: Joseph Norelli (Ext. 9397)

[Caption omitted in printing]

NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Roger S. Kaplan, and all prior pleadings and proceedings had herein, and upon the accompnaying Memorandum of Law, the undersigned Counsel for Plaintiff will cross-move this Court, at a Motion Part thereof, at the United States Courthouse, Foley Square, New York, New York, on September 23, 1975 at 4:00 P. M., or as soon thereafter as counsel can be heard, for an Order pursuant to F. R. Civ. P. 56(a), (c) granting summary judgment in favor of Plaintiff on the grounds that there is no genuine issue as to any material fact and Plaintiff is entitled to judgment for the relief demanded in the Complaint as a matter of law, or a stay of proceedings in N. L. R. B. Case No. 2-CA-13745 pending disposition of this action, and granting such other and further relief to Plaintiff as the Court deems just and proper in the circumstances.

Dated: New York, New York
September 9, 1975

Respectfully submitted,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
261 Madison Avenue
New York, New York 10016
(212) 697-8200
By /s/ Roger S. Kaplan

ATTORNEYS FOR PLAINTIFF

To: ABIGAIL COOLEY, ESQ.
Assistant General Counsel for Special Litigation
National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D.C. 20570
Telephone: (202) 254-9221

WINIFRED D. MORIO, ESQ.
Regional Attorney
Region 2
National Labor Relations Board
26 Federal Plaza
New York, New York 10007
Telephone: (212) 264-0332

AFFIDAVIT IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROGER S. KAPLAN, being duly sworn, deposes and says:

1. I am associated with the firm of Jackson, Lewis, Schnitzler & Krupman, attorneys for Plaintiff, THE TITLE GUARANTEE COMPANY, etc., and am fully familiar with the facts and circumstances herein. I make this affidavit in support of Plaintiff's Cross-Motion for Summary Judgment.

2. This action has been instituted pursuant to the Freedom of Information Act, as amended, 5 U.S.C. §552(a)(4)(B)(1975), to obtain certain statements contained in the investigative files of the National Labor Relations Board ("the Board"), and to stay Board proceedings against Plaintiff pending such disclosure.

3. The facts underlying this action and Cross-Motion are fully described in the Complaint, the exhibits annexed to the Complaint, and Plaintiff's Memorandum accompanying this Cross-Motion. Briefly, Plaintiff herein is a respondent in a Board unfair labor practice proceeding (Case No. 2-CA-13745) where it has been charged with a violation of Section 8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. §158(a)(5), by withdrawing recognition and refusing to bargain with an incumbent union. A board complaint incorporating this charge has been issued and an administrative hearing on the complaint has been scheduled for October 14, 1975.

4. Pursuant to the Freedom of Information Act, as amended, ("F.O.I.A."), 5 U.S.C. §552(a), and the Board's regulations issued thereunder, 29 C.F.R. §102.117, as amended, Plaintiff sought to obtain copies of the statements taken by Board agents who were investigating the union's unfair labor practice charge. This

request was denied first by the Board's Regional Director for Region 2, and on appeal, by the Board's General Counsel.

5. The only issue for determination is whether the statements sought must be disclosed pursuant to the F.O.I.A., or whether they are exempt from the Act's provisions under 5 U.S.C. §552(b). The Board has maintained that they are exempt as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," 5 U.S.C. §552(b)(5). It has also contended that the statements constitute "investigatory records compiled for law enforcement purposes," and that disclosure of all, or even parts of them, would "interfere with enforcement proceedings," "constitute an unwarranted invasion of personal privacy," and "disclose the identity of a confidential source," 5 U.S.C. §552(b)(7)(A), (C), (D).

6. For reasons more fully discussed in our Memorandum we do not believe these arguments have merit. Exemption 5 was intended to protect the deliverative processes of Government, not the "raw data" contained in investigative files, such as these statements. With respect to exemption 7, the amended Act requires close scrutiny of the particular proceeding involved. Here, such scrutiny fails to establish justification for exemption of the statements. The bargaining history of TITLE GUARANTEE, the nature of the violation alleged, the circumstances in which the alleged violation took place, the identity of the charging party, the nature of the Board's investigative processes, the safeguards available to persons supplying information to the Board, and an examination of the reasons traditionally associated with granting confidentiality to Government witnesses, combine to demonstrate that withholding would be improper in the circumstances of this case.

7. While the need for the records requested under the F.O.I.A. is generally irrelevant according to the caselaw, Plaintiff does have

a very real need for the records sought here. They are needed to adequately prepare for the hearing on the Board's unfair labor practice complaint. Since TITLE GUARANTEE'S defense is predicated on a good-faith, reasonably based doubt of the union's continued majority status, these affidavits would reveal whether any statements were made, or thought to have been made, by Plaintiff's representatives to persons providing the statements, bearing upon Plaintiff's good faith or the reasonableness of its doubt. They would also provide insight into the Union's version of events at the negotiating session where Plaintiff announced its withdrawal of recognition to union representatives and employees on the negotiating committee. All of these matters are relevant to the issues in the Board proceedings. Under the Board's restrictive approach to pre-trial interviewing of employees, and the unavailability of non-employee witnesses, i.e., union representatives, this information cannot be readily obtained through "self-help" measures.

8. We request that this Cross-Motion "take precedence on the docket over all cases . . . and be assigned for . . . argument at the earliest practicable date and expedited in every way," except as to cases the court considers of greater importance, in accordance with the F.O.I.A. 5 U.S.C. §552(a)(4)(B). We further request that, pending the decision in this matter, and until such time as the Board furnishes the statements to Plaintiff and Plaintiff has had a reasonable time to study them, the Board be enjoined from proceeding with the hearing scheduled for October 14. Plaintiff will be irreparably injured otherwise, for it will be unable to fully prepare for that hearing.

9. Since there are not genuine issues as to any material fact (any issues which may exist can easily be resolved in an in camera inspection of the statements authorized under 5 U.S.C. §552(a)(4)(B)),

and Plaintiff is entitled to judgment as a matter of law, summary judgment is appropriate. In the event this Court decides not to grant summary judgment at this time, Plaintiff requests that it stay the Board from proceeding with the hearing in N. L. R. B. Case No. 2-CA-13745 pending resolution of this action. Failure to grant such a stay, would undermine the rights conferred by the Freedom of Information Act.

WHEREFORE, Your Deponent prays that Plaintiff's Cross-Motion for Summary Judgment be granted.

/s/ Roger S. Kaplan

Sworn to before me this 9th
day of September, 1975
/s/ Gregory S. Rasin

[TRANSCRIPT OF PROCEEDINGS]

1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

* *

THE TITLE GUARANTEE COMPANY, etc.,
Plaintiff,

against — 75 Civ. 3828

NATIONAL LABOR RELATIONS BOARD,
Defendant.

* *

Before:

HONORABLE LEE P. GAGLIARDI,
District Judge.

October 1, 1975 - 4:30 p. m.

Appearances:

JACKSON LEWIS SCHNITZLER & KRUPMAN, Esqs.
Attorneys for Plaintiff
BY: ROGER S. KAPLAN, Esq., of Counsel.

JOSEPH P. NORELLI, Esq.
Attorney for Defendant

2 THE CLERK: Title Guarantee Company versus Labor Relations Board Is the plaintiff ready?

MR. KAPLAN: Yes.

THE CLERK: Is the defendant ready?

MR. NORELLI: The defendant is ready.

THE COURT: All right, gentlemen. We had a short discussion inside prior to this and I understand that, and correct me if I am wrong, you gentlemen have agreed that there is no fact question involved here, is that correct?

MR. NORELLI: That's correct, your Honor.

MR. KAPLAN: Your Honor, it's our position that there is no factual question involved in the plaintiff's position and if the Board is content with that, with feeling there is no factual question of its own, we are content to proceed.

THE COURT: Yes.

MR. NORELLI: It is the defendant's position in this action that there is no matter of fact to be tried. It is purely a question of law.

THE COURT: It is strictly a question of law as to whether or not you are required to turn over pursuant to the Freedom of Information Act statements, affidavits, taken from the witnesses in connection with --

3 MR. NORELLI: Your Honor, excuse me. Not witnesses, just individuals coming forward with information. It is of course our policy to turn over at the trial statements of actual witnesses for purposes of cross-examination.

THE COURT: That doesn't help me here. My only concern is whether or not under the Freedom of Information Act you are required to turn over these records in your file, is that correct?

MR. NORELLI: That's correct.

THE COURT: It is solely a question of law and as I understand it, the NLRB does not question the jurisdiction of this Court to issue an injunction in the event that the Court finds that you are required to turn them over, is that correct?

MR. NORELLI: The defendant's position is that the Court has jurisdiction to enjoin the withholding of documents and has jurisdiction to enjoin Board proceedings, but only in unusual circumstances and upon the showing of irreparable harm.

THE COURT: All right, do you want to argue the motion, gentlemen?

MR. NORELLI: As you are aware, your Honor, the plaintiff
4 is a respondent in an unfair labor practice proceeding presently before the Second Region here in New York. In order to prepare his defense in that action plaintiff has requested this Court, one, to enjoin the Board from withholding any affidavits and statements in our investigatory file as well as to enjoin the conduct of the Board hearing presently scheduled for October 14. While it is clearly the district court's function to interpret and enforce the Freedom of Information Act, Congress in enacting the National Labor Relations Act described procedure for review of administrative proceedings and that was exclusively within the province of the circuit courts. The Supreme Court held this in Myers v. Bethlehem back in 1938 and was recently affirmed by the D. C. Circuit Court in the Sear's case and similarly with respect to renogotiation Board hearings in the Mannercraft case. Therefore, it is the position of the defendant that to permit plaintiff to seek intervention in the Board's proceedings at this point would be to suggest an over-the-shoulder supervision of the Board which was not intended by the Congress in enacting the National Labor Relations Act.

In addition it is the position of the defendant that there is no showing in this case of irreparable harm necessary for an injunction
5 such as that which is sought. It has been well established traditionally by the Supreme Court that the burden of submitting two hearings and the additional litigation costs which might stem from refusal of the Court to grant the injunction is not irreparable injury or irreparable harm within the definition of that term. For these reasons first we request that the Court deny that injunction of the Board proceeding.

With respect to the merits of the Freedom of Information Claim, I think it's first necessary to look at the legislative intent of Exemption 7. It is clear from the Congressional Record that this

Act was passed to effect by disclosure, by maximum disclosure greater public awareness of the operations of government agencies and in Franco v. the SEC the Second Circuit termed it this way. They said the ultimate purpose of the Freedom of Information Act is to enable the public to have sufficient information in order to be able through the electorial process to make intelligent, informed choices with respect to nature, scope, and procedure of the federal government governmental activities. This is clearly not the purpose for which plaintiff seeks the statements and affidavits in this case. The Supreme Court in the Sear's case and the Mannercraft case

6 repeated the language of Franco, but added they were specifically rejecting discovery in litigation as the purpose of the Freedom of Information Act. The Court rejected that. While as I said the Freedom of Information Act leans toward maximum disclosure, Congress in passing it recognized that there were certain legitimate governmental and private privacy interests to be protected. They therefore provided nine exemptions. We are concerned here basically with Exemption 7 and also with Exemption 5 secondarily. Exemption 7 as originally enacted read as follows, that the Freedom of Information Act shall not apply to investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency. The statute was passed in 1966, but from 1967 to '74 a body of case law developed interpreting the Freedom of Information Act and particularly Exemption 7. That was done on a case-by-case basis evaluating the circumstances in which the request was made and the purposes of Exemption 7. However, in 1974 it became apparent that circuit courts were departing from this case-by-case approach. In particular in the D. C. Circuit Court several decisions came down in 1974 which are cited in our brief, including the Weinberger and the Weisberg case. In these

7 cases the Court stated or held that investigatory files were

exempt from disclosure simply because they were investigatory files or contained in investigatory files. Congress reacted to this immediately and passed the 1974 amendments which would force the courts to look into the actual purpose of the amendment. They did that by providing or enacting six of the judicially established categories of exempt material right into Exemption 7. Of these six it is our position that three are applicable to Board statements and affidavits. Those are 7-A, -C and -D.

THE COURT: Has your agency made available any records of any kind?

MR. NORELLI: Yes, the agency makes final opinions which were not previously made available -- they are not made available. We have made available administrative staff manuals. Our case handling manual has been made available. Purely factual -- certain purely factual -- well, I couldn't really say that. I am not really aware of how much else has been made available, but getting back to the legislative history which I think is of crucial importance in this case, the Fourth Circuit back in 1971 in Wellford v. Hardin indicated that the legislative history of Exemption 7 had the purpose of protection of the government's case in court by preventing pre-

8 mature discovery in enforcement proceedings. Picking up on this in 1974 when Senator Hart introduced his amendment which are the present Exemption 7, he commented that the amended as well as the original Exemption 7 was intended to prevent harm to the government's case in court by not allowing opposing litigants earlier or greater access to investigatory files than he would otherwise have. Therefore, I have to go to the existing Board procedures for discovery and the Second Circuit, among other circuits, have held that the Board's policy of not permitting pretrial discovery of statements and affidavits is proper if recognized legitimate government or Board interests are protected and private interests. However, of

course, Section 102.118 of the Board's rules and regulations, which is consistent with, or I should say is the Board's embodiment of the Jenck's Act does permit the production of pretrial affidavits after a witness has testified in a court hearing so that counsel for the respondent would be able to accurately cross-examine. There are basically three reasons for the Board's position on pretrial discovery and affidavits and statements. The first and of major importance is that it is necessary for the Board to protect its sources of information. The Board, unlike other agencies, cannot act on its own. It relies upon individuals to come forward and file charges and to provide information in support of the charges. Our experience has shown, and I think it's self-evident, that employees and other individuals would be reluctant to come forward with this information if they knew that the Board would make these statements routinely available to the public, but the Freedom of Information Act does not discriminate between members of the public. It does not consider the rights of a litigant. It was not intended for that. If we make these documents available they must be made available to anyone upon request. I think this is one of the reasons for the Board's reluctance to turn over these affidavits.

THE COURT: That's not the case here because here is a case of somebody in particular who is a respondent in an NLRB enforcement proceeding, isn't that right?

MR. NORELLI: Yes, but the Act refers to members of the public and clearly if we were to turn them over in one case we would have no justification for not turning them over on others because the Act does not permit us to discriminate.

The second reason for the Board's policy is that the general counsel in presenting or in enforcing the National Labor Relations Act must be able to present its strongest case. To permit premature discovery of the content of the file or the evidence against

the respondent might permit respondent to frustrate enforcement proceedings or construct artificial defenses which in the labor sector are particularly easy to do, to construct, and if this was the case we would have violations going on unremedied.

The final reason for this Board policy is one and the same with the attorney work product privilege established in Hickman v. Taylor, or recognized in Hickman v. Taylor. Second, courts, including the Second Circuit, have held that Board affidavits or statements are in fact part of the attorney work product. The reasons set forth in Hickman v. Taylor, for those reasons, clearly permitting the invasion of an attorney's work product would have a dilaterious effect upon the whole adversarial aspect of the Board's proceedings and thereby would come within 7-A by interfering with enforcement proceedings.

11 THE COURT: I take it your position is that you are protected under the provisions of A, B, C and D?

MR. NORELLI: 7-A, -C and -D. 7-A is interference with enforcement proceedings. 7-C which I was going to get to about now anyway, privileged statements or any information where their disclosure would constitute unwarranted invasion of personal privacy. That language, unwarranted invasion of personal privacy comes from the original Freedom of Information Act. We are in Exemption 6. Congress set this as the standard for disclosure of medical and personnel files. However, in Exemption 6, the language was personnel and medical files disclosure which would constitute a clearly unwarranted invasion of personal privacy. Under Exemption 6, the Court interpreted this balancing test in which you had to weigh personal privacy of individuals against disclosure. The courts interpreted this as being tilted in favor of disclosure because of the words "clearly unwarranted." However, when Congress had this before it as a proposed amendment for 7-C, at the suggestion of President

Ford, who was concerned for the personal privacy of individuals, the word "clearly" was intentionally deleted so that it reads "unwarranted" -- "in any unwarranted invasion," and this was intended and should be
12 interpreted to exclude the balance in favor of personal privacy.

I might add in this respect that Congress just about the same time had passed the Privacy Act in 1974 and in fact, in that Act, although I am not totally familiar with it, the purpose of that Act is to allow individuals who give information to the government to determine to whom which documents or such information will be disclosed.

Finally, it is our position that Exemption D is applicable. Exemption D is the Freedom of Information Act embodiment of the informer's privilege. Under the original Freedom of Information Act, Exemption 7 didn't mention the informant's privilege. Rather, the courts in deciding these cases employed such a privilege under Exemption 7. However, under the amendments in 1974, Congress specifically included the informant's privilege in Exemption 7. Senator Hart stated that his amendment, 7-D, was designed to protect the identity of informants whether they be paid informants or simply concerned citizens who give information to enforcement agencies and desire their identity to be kept confidential.

The D. C. Circuit Court recently interpreted that 7-D as having a two-fold effect which is both beneficial to the government and to
13 individuals. The court said that 7-C encourages cooperation of those not obligated to give information. That is, those who come voluntarily to assist the government, while also protecting the identity and the confidentiality of those who must come forward.

Further, I call the Court's attention to the Congressional conference report which defined confidential source. They said the identity of a person other than a paid informer may be protected if the information was given under an express assurance of confidentiality,

or, in circumstances from which such assurance could be reasonably inferred.

Now, as noted in our brief, the NLRB, Section 10058.14 sets forth the Board's policy of assuring confidentiality in compliance. It is the policy of the Board -- I should say that that Section sets forth what our policy on confidentiality is and that is that witnesses, concerned witnesses or concerned affiants should be told that the statement they give will be used only by the Board in its investigation so it can ascertain the total picture and it will not be used for any other purpose until and unless the witness testifies in a hearing.

I think, considering this published procedure as well as the
14 long-standing and well-known policy of the Board not to permit disclosure of these affiants, that even in circumstances where an express assurance of confidentiality is not given, I think you have reasonable circumstances under which an assurance can reasonably be inferred.

Finally, is Exemption 5. The recent Sear's decision in Exemption 5, the Supreme Court basically defined Exemption as embodying two specific and separate privileges. The first was the executive privilege which protects the consultative function, consultative and deliberative function of government. The second was attorney work product. The court set forth its test. The test is to whether either or both of these privileges would be applicable, and that test was whether documents would be normally privileged in a civil discovery contest.

In the Brockaway case decision which came after the Sear's decision, the Eighth Circuit held that the executive privilege was applicable to affidavits obtained by the Air Force in the investigation of Air Force disaster or aircraft crash. The court there, the Eighth Circuit said that such statements were not routinely available in general discovery. It also found that the executive privilege was not

15 limited to material of a purely deliberative or policy-making nature but extends to factual matter obtained under promise of confidentiality, the disclosure of which might make future potential witnesses reluctant to come forward, therefore, inhibiting the flow of information to agency decision-makers and thereby diminishing the quality of agency decisions.

This is basically the rationale in Brockaway. I think this rationale is equally applicable to Board affidavits because Board affidavits serve a two-fold purpose. They serve as the factual foundation for the administrative decision as to whether or not to issue a complaint and I think it is consistent with the Supreme Court decision in Sear's and the Eighth Circuit decision in Brockaway that in order to assure the highest quality of decision-making, we must assure the best and freest flow of information to the ultimate decision-makers and that any action that we would take which would limit the amount of information which would reach the agency decision-maker would have an adverse effect. We would have charges dismissed or we would be issuing complaints in cases where we did not have the whole picture.

THE COURT: Isn't there a proper remedy for that in the event I find a wrong interpretation of the Freedom of Information Act?

16 MR. NORELLI: I don't think the Freedom of Information Act was intended to imply. If the Court so holds, I think the agency such as the National Labor Relations Board would be in big trouble. I think people, especially employees and not only employees by especially employees, especially people who are still employed and have been discriminated in a manner other than ultimate discharge, will be very hesitant to come forward. The situation often is that an employee believes this his employer has violated the Act but he doesn't know. He is aggrieved in one way or another so he files a charge

and it turns out he has been aggrieved but it does not constitute a violation of our Act.

THE COURT: That is what happens when you have competing interests and you have to enact legislation in separate fields.

MR. NORELLI: The Freedom of Information Act was intended to inform the general public other than enforcement proceedings and that Congress in the NLRB left it up to the circuit courts to supervise the Board's discovery procedures.

THE COURT: Do you presently know how many witnesses or what witnesses you are going to call in your proceeding?

17 MR. NORELLI: I have discussed this with the attorney in the region handling the case and he informs me they have not yet determined what witnesses if any will be called because there is a strong possibility they may be granted summary judgment because of the defendant's failure to come forward with any evidence at this point.

I might add --

THE COURT: How many people are concerned?

MR. NORELLI: That is one of the interests which we are here to protect.

THE COURT: You mean the number?

MR. NORELLI: The number is part of the Government's case.

THE COURT: You are willing to disclose it to me in camera but not to the other side?

MR. NORELLI: No. If your Honor were to decide that none of the exemptions just discussed apply to Board statements or affidavits, would it be your position you would turn over the entire documents without any regard to certain matters in the documents which you might find had you made an in camera inspection to be inspected?

THE COURT: Do you hesitate to turn over all the names of the persons or the contents?

18 MR. NORELLI: The contents lead to the identity of the affiants. It may be the case, and we have had situations where affidavits merely recite matters which no one would have any interest in protecting.

THE COURT: What prompted my concern is the number of witnesses. If you are going to call all of the people from whom you have statements or affidavits, if you are going to call them on your trial, in the event you don't succeed in your summary judgment application, it is information you are going to have to turn over to the defendant at some time.

The question is whether you will turn it over now or after the witness testifies, and I was just wondering whether that was the situation, if this isn't much ado about nothing.

MR. NORELLI: I would say on the one hand, no, we don't know who will be testifying at this point or if there will be any testimony at all. Right now I think the case rides on the presumption, and it won't require a trial, but on the other hand, I think that even if every witness whose statement the Board has were to testify, we would not turn that over at this point because when we do turn those over, they are turned over only for the purpose of cross-examination and our rules, and I think the Jenck's Act itself provides for an in camera

19 inspection of those affidavits by the presiding officer or the judge.

THE COURT: They have to be turned over after you complete your direct examination.

MR. NORELLI: Our internal rule provides that we may request that the administrative law judge examine the documents and delete any portion -- examine the documents in camera and delete any portions which might not be relevant to cross-examination which might deviate from the direct testimony of the witness. That is why it is done after the witness testifies and that is why I would not turn them over at this point, if it were certain these people were to testify.

THE COURT: Thank you.

MR. KAPLAN: My name is Roger Kaplan, from the law firm of Jackson, Lewis, Schnitzler & Krupman and we represent the Title Guarantee Company, the plaintiff in this case.

This is an action under the amended Freedom of Information Act. Title Guarantee is seeking copies of statements taken by Board agents during an investigation of an unfair labor practice charge against the company. The Board has thus far refused to produce these statements and a Board hearing on the case has been scheduled for October 14.

The Freedom of Information Act, the Act which is in question here, presumes that all government documents are disclosable. The government has the burden of proving, de novo, that specific documents or portions of them may be withheld under the specific exemptions of the Act. The exemptions are permissive and not mandatory. They need not be invoked. When they are, they are to be narrowly construed.

Thus, even where only a portion of the document is found not exempt, it must be disclosed. Congress has specifically provided for an in camera inspection by the Court to aid in resolving issues of government withholding under this Act.

In this case, the Labor Board has invoked Exemption 5 and 7 of the Act to bar disclosure of the statements. The Board appears to argue that the Court should even dispense with an in camera inspection. In its view it seems that investigative statements are exempt irrespective of the nature of their contents or the proceedings out of which they arise.

Preliminarily, we observe there is no evidence offered by the Board in support of its motion. No affidavits accompany its papers, nor apparently does the government wish to call witnesses and it does

21 not offer willingly the documents for in camera inspection. It relies exclusively on argument of counsel, both oral and in brief. That is insufficient.

The amended Act states that the burden is on the agency to sustain its action in withholding. That is Section 552-A4B. The conference report on the Act, the amendments further explains that while an in camera examination need not be automatic, in order to avoid it, the government must establish by means of testimony or detailed affidavits that the documents sought are clearly exempt from disclosure. Here the Board has supplied neither.

At a minimum, we think it is appropriate for the Court to direct an in camera inspection. The Board we have said relies on Exemptions 5 and 7.

THE COURT: I understand that the Board is willing to submit all documents for an in camera inspection so that is the minimum they concede, is that correct?

MR. NORELLI: Sure.

MR. KAPLAN: Turning to the exemptions then, we consider the arguments in turn. The first exemption is 5. This exemption relates to interagency, intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

22 I note in passing that the government in its administrative action here, in its letters, never discussed Exemption 5. We have argued it in brief, and we continue to argue that this argument should not be considered by the Court. The de novo provision, the statute, was intended as a benefit to the seeker of information and not to the government. It was contemplated in the statute that by the time this matter went to Court, the government would have fully decided the basis for its withholding and that it would have fully communicated that basis to the requester of documents.

That apart, I think the exemption is inapplicable in this situation. It was intended to protect the deliberative, consultative and policy-making processes of the government. It covers analysis, evaluations, recommendations, and the like which pass back and forth between government officials.

The Supreme Court has said in Environmental Protection Administration v. Patsy Ming, that as a general proposition, Exemption 5 does not shield from disclosure purely factual investigative matters. Only if the factual matter is inextricably without compromise of the deliberative process, in other words, so would up in the deliberative
23 aspect of the case, may it be protected. That is not the situation here.

The Board's affidavits are in fact its raw data. It is purely factual material. By themselves, they do not reflect the Board's view of the importance of the information contained, the credibility of the deponent who gave the statement or any other deliberative or consultative aspect.

While the Supreme Court in Sear's stated that the attorney work product privilege was within the canon of Exemption 5, it held specifically in that case only that "memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy are exempt."

We are not seeking such materials here. We are seeking purely factual materials. Moreover, there is a serious question which I think counsel adverts to in his memorandum about whether these statements are in fact memorandums and letters within the contemplation of this particular exemption.

There is nothing in Brockaway, either, I think, that supports the position taken by the Board here. Brockaway, the statements that counsel is alluding to, dealt with an Air Force accident investigation.

24 Statements were obtained for internal use only as part of a safety program to find out the causes of these aircraft accidents and take corrective measures. They were not taken for administrative or disciplinary purposes. In fact, the statements which were taken for those purposes in Brockaway were disclosed and the Court refers to them in the statement of the facts at the opening of the case.

In any event, I think Brockaway seems a questionable authority in this district. In a case called Rabbitt v. Department of the Air Force, 383 F. Sup. 1065, Judge Lasker held that aircraft accident investigative reports were disclosable notwithstanding an Exemption 5 argument by the Air Force.

We believe in sum, that Exemption 5 was not intended to cover the purely factual statements that we have in issue here. The Board statements, if they are exempt at all, are exempt by virtue of Exemption 7.

THE COURT: Didn't I understand, or maybe I wasn't following carefully, that all the NLRB does not want to disclose here are covered by 7, what they claim is a 7-D exemption? Is that correct?

MR. NORELLI: 7-A, -C and -D and Exemption 5, your Honor.

THE COURT: All right. I misunderstood you.

25 MR. NORELLI: I did say that A and C were applicable because these were investigatory records compiled during the course of enforcement proceedings.

MR. KAPLAN: I am prepared to discuss Exemption 7 at this point.

This exemption applies to investigatory records compiled for law enforcement purposes but only in certain circumstances. Here the Board claims that disclosure would interfere with enforcement proceedings, would constitute an unwarranted invasion of personal privacy and disclose the identity of a confidential source.

The Board's claim is that the company's right under the Freedom of Information Act should be determined solely by reference to any pretrial discovery provisions contained in the Board's own regulations. That is essentially what this argument comes down to. Of course, there are no such provisions. The Jenck's rule, which the agency has followed, permits discovery, if you can call it that, only after a witness has testified on direct examination for general counsel at the hearing in the case.

In a case reported the other day which has been forwarded to the Court, Cessna Aircraft Company v. the Labor Board, the district court rejected a similar argument, or series of arguments by the Board stating, the Board cannot seriously contend that it is somehow exempt from the provisions of the Act or that its internal rules and regulations regarding discovery may apply to nullify provisions of the Act or that plaintiff here simply because it is engaged in litigation before the Board is relegated to a lesser status than general members of the public who may seek information pursuant to the Act.

The court in Cessna, of course, directed an in camera inspection and criticized the Board's position similar to the one taken here.

We think Cessna accurately reflects the present la[illegible]e purpose of the 1974 amendments in particular was to prevent government agencies from unilaterally determining what information the public was entitled to. Here the Board seeks to negate the 1974 amendments and override their intent.

Returning to the specifics of the Board's argument, the Board says disclosure would interfere with enforcement proceedings. It does not say how. The legislative history of the recent amendments instruct us that in applying the amendments, it is only relevant to make a determination in the context of the particular enforcement proceeding.

That is a quote from Senator Hart.

27 The Board here has made no effort to show how its case in court would be harmed, and I think they are talking about legal harm, by the disclosure of the statements in this case at this time. All the Board does is speculate and generalize. And there is nothing in the history of Title Guarantee, the nature of the offenses now alleged, or the Board's theory of the case which is based on a presumption of continuing majority status, which suggests any sort of real harm. This employer for thirty years has had a collective bargaining relationship and has never once been charged with any unfair labor practices in all that time. The allegations in the present complaint say only that we refused to bargain and do not allege any threats, interrogation, coercion, discriminatory conduct in violations of 8-A3 or -4 against individual employees.

So, I think this argument cannot be sustained. The Board has not shown any real harm and I doubt that it can.

Turning to the next contention, that disclosure would constitute an unwarranted invasion of personal privacy. We believe this contention is plainly frivilous. There is nothing in the context of this case which can conceivably reveal intimate details of a highly per-

28 sonal nature, Getman v. NLRB, 450 F. 2d, 670 described as Exemption 6.

Counsel has struggled laboriously to say that present Exemption 7-C is far different from Exemption 6 which is unchanged under the present law. The only change, really, is the elimination of the word "clearly" from the expression "clearly unwarranted invasion of personal privacy."

It has not thrown the burden the other way in saying everything should be kept hushed up. All it is saying is that there might be a slightly lesser standard used than would be under Exemption 6. As he

points out, President Ford had desired the expression "clearly unwarranted" to be deleted and Congress went half way. He still vetoed the bill anyhow.

A reading of the legislative history makes clear that 7-C was really simply an attempt to carry over the sixth exemption for personnel files into investigatory records. There is no decision to my knowledge which distinguishes between "clearly unwarranted" and unwarranted." The Getman case does give a description of the "clearly unwarranted" language.

Finally, the Board urges that statements would disclose the identity of a confidential source. The issue here is really whether
29 the sources are confidential, in fact. For one thing, as we have pointed out in our memorandum, we do have a general idea of who the sources are. There is only one act that really took place in this case. The company was at a negotiating meeting with the union and told the union representatives -- these were two union representatives and three employees on the committee. "We doubt you continue to represent a majority of the employees." That is really the only factual confrontation or circumstance in this entire case. There were only a limited number of people at that meeting. We know who they were, obviously, and they know we know. A number of those people I point out are union officials and not employees of the company.

I would point out further, since the Board is relying on a presumption, there is no -- there would have been no need for it to have examined other witnesses. Obviously the union officials had some idea of what the status, the majority status question was and the employees knew what was going on at this meeting.

In any event, there is no proof that the witnesses have in fact been assured of confidentiality. We have an assertion that is is now the Board's standard policy --

30 THE COURT: That was something else I wanted. Was it at the time? Were these statements given under an assurance of confidentiality at the time or not?

MR. NORELLI: I don't know.

MR. KAPLAN: May I point out the firm with which I am associated has for many years practiced labor law and exclusively practices labor law and it was not our understanding that this was the standard policy. My own experience has not shown that to be the case and I question or I wonder whether or not this new-found policy may somehow be an attempt to ride the coattails of what the Board thinks is an out under the Freedom of Information Act, which brings me to my next point. Even if these statements were given under assurances of confidentiality, I think the Court must still inquire whether the assurances were reasonable under the circumstances. The government should not be permitted to avoid its obligations under the Freedom of Information Act by gratuitous offers of confidentiality. In other words, were these offers necessary under the circumstances? We don't think they were, not in the light of the nature of the respondent, the nature of the offense charged, the whole circumstances under which this case arose. Also, the fact that the union under the Board's rules is really obliged to cooperate in the investigation. The Board does not really go out and do a lot

31 of leg work. What typically happens is, a day or two after you file your charge, you get a call from the investigator, come down, bring your affidavits, bring your witnesses, and let's see what you have and if you don't cooperate, you may get your case dismissed. That is the so-called members of the public who might be reluctant.

I point out, the union has a very real private interest in this. They are not just disinterested spectators. They stand to win the case so they have a real interest in participating.

I would conclude on the fact of this portion of the exemption, that even if the Court were to determine that Exemption 7-D, the

confidentiality source exemption were to apply, the exemption limits it only to the identity of the person giving the statement.

The Board has said that it would not give us the rest of it because the rest of it would be meaningless to you.

THE COURT: I think they are saying, from what you get on the balance of it, you can determine who it is.

MR. NORELLI: That is correct, your Honor.

MR. KAPLAN: They have said in court to us and you can see from the exhibits and the complaint, that the rest of it, that

32 we could give you would be so meaningless it would be worthless to you so we are not going to give any of it to you. They have said that also.

Be that as it may, the fact remains that the Court has the ultimate determination as to what parts are disclosed and what parts may be withheld and not the Board, and I would call the Court's attention to the case of Kammaner v. NLRB submitted to you yesterday which is also authority for this type of approach.

Finally, the question of the injunction.

THE COURT: I don't need argument on that. They conceded I had jurisdiction to grant it. I anticipate under the circumstances here to render a decision prior to the return date before the NLRB and from there on, depending on that decision -- if that decision is rendered by that time, there is no need for an injunction.

MR. KAPLAN: We have asked for it but we really don't want it. We prefer to get the information prior to the return date of the Board hearing and take it from there.

THE COURT: How could I have these made available to me if I want an in camera inspection?

MR. NORELLI: We have a representative of the region here.

THE COURT: If I want to, we can get it?

MR. NORELLI: Yes.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE TITLE GUARANTEE COMPANY, a Subsidiary of PIONEER NATIONAL TITLE INSURANCE COMPANY, a Subsidiary of TITLE INSURANCE AND TRUST COMPANY, a Subsidiary of THE TI CORPORATION (OF CALIFORNIA), Plaintiff,	
- against -	75 Civ. 3828
NATIONAL LABOR RELATIONS BOARD, Defendant.	

[Appearances omitted in printing]

OPINION

GAGLIARDI, D. J.

I

By this action, the Title Guarantee Company ("Title Guarantee") seeks to compel the National Labor Relations Board (the "Board" or "N. L. R. B.") to produce for inspection and copying, pursuant to the Freedom of Information Act, as amended, 5 U. S. C. §552, (the "Act"), certain materials relating to an unfair labor practice charge against Title Guarantee. Plaintiff also seeks preliminary relief restraining the Board from conducting its administrative hearings until the issues herein have been resolved and, should disclosure be ordered, a stay of the administrative proceedings until a reasonable time after such disclosure.

The defendant has moved to dismiss the complaint for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6), or, in the alternative, for summary judgment under Fed. R. Civ. P. 56(c). According to the Board, the district court is without jurisdiction to enjoin the administrative proceedings and the material is exempt from disclosure under the Act. Title Guarantee has cross-moved for summary judgment.

Counsel for both sides have agreed that there is no material issue of fact in this case. Briefly stated, the factual background is as follows: On May 28, 1975, District 65, Wholesale, Retail, Office and Processing Union, Distributive Workers of America (the "Union") filed an unfair labor practice charge with the Regional Office of the N. L. R. B. in New York alleging that Title Guarantee had refused to bargain with the Union. National Labor Relations Act §§8(a)(1), (3), 29 U. S. C. §§158(a)(1), (3). Amended charges were filed alleging, in addition, refusal to bargain in violation of §8(a)(5) of the National Labor Relations Act, 29 U. S. C. §158(a)(5). On June 30, 1975, after investigation by the Regional Office, the Regional Director issued a complaint charging violations as alleged by the Union. Hearings were ultimately set for October 14, 1975.

In July, 1975, Title Guarantee requested that "copies of all written statements, signed or unsigned, contained in the Board's case file . . . be made available for inspection and copying" and that "any such statements taken subsequently also be made available." Primarily, Title Guarantee is interested in receiving written reports or signed affidavits which resulted from Board interviews of witnesses offered by the charging party. See N. L. R. B. Field Manual §§ 10056.2, 10056.5; 29 C. F. R. §101.4. The Regional Director denied the request citing Exemptions 5 and 7(A), 7(C), and 7(D) of the Act, 5 U. S. C. §552(b)(5), 7(A), 7(C), 7(D). On August 1, 1975, the General Counsel of the Board denied Title Guarantee's appeal for substantially the same reasons cited by the Regional Director. The instant action was then instituted and in camera inspection of the material in question was conducted by the court. 5 U. S. C. §552(a)(4)(b).

II

At the outset, it is important to determine the jurisdictional aspects of this matter. As noted, plaintiff seeks both an order compelling disclosure and an injunction barring any administrative hearings until disclosure is made. With respect to the request to

compel disclosure, it is unassailable that this court has jurisdiction at this time to order the production of documents under the Freedom of Information Act. 5 U.S.C. §552(a)(4) provides that:

> [o]n complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

As the Court held in a similar situation in Cessna Aircraft Co. v. N.L.R.B., ___F. Supp. ___, ___, 90 L.R.R.M. 2376, 2378 (D. Kan. 1975):

> this is not an action to review decisions of the Board regarding discovery matters which may or may not arise during the hearing in controvery before that Board. This is a separate and distinct action to enforce provisions of the Freedom of Information Act whose benefits are available "to any person." The Board cannot seriously contend that it is somehow exempt from provisions of the Act, or that its internal rules and regulations regarding discovery may apply to nullify provisions of that Act, or that plaintiff here, simply because it is engaged in litigation before the Board, is relegated to lesser status than general members of the public who may seek information pursuant to provisions of the Act.

This court concludes, therefore, that it has jurisdiction to entertain plaintiff's action to order the agency to produce the material in question.

With regard to the court's injunctive powers, the N.L.R.B. cites Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1 (1974), and Sears, Roebuck & Co. v. N.L.R.B., 473 F. 2d 91 (D.C. Cir. 1972), cert. denied, 415 U.S. 950 (1974) for the proposition that the "Freedom of Information Act does not empower this court to enjoin Board proceedings." This reliance is misplaced. In Bannercraft, the Supreme Court wrote that

> [w]ith the express vesting of equitable jurisdiction in the district court by §552(a), there is little to suggest despite

> the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court.

415 U.S. at 20. What Bannercraft held was that, although the Court believed that the district court had jurisdiction to enjoin an administrative proceeding, in "a renegotiation case," the "nature of the . . . process" was such that plaintiff would suffer irreparable harm if negotiations continued pending resolution of the Freedom of Information claim. 415 U.S. at 20 (emphasis original).

Similarly, in Sears, contrary to defendant's interpretation, the District of Columbia Circuit noted that

> the District Court was correct in its premise that there is jurisdiction to enjoin agency proceedings pending resolution of a Freedom of Information claim.

473 F.2d at 93. The Court held only that under the peculiar circumstances of that case, the Board having issued a complaint at Sears' own request, Sears had made no showing of irreparable harm.

In the instant case, "with the express vesting of equitable jurisdiction in the district court" by the Act, Bannercraft, supra, this court holds that it has jurisdiction to enjoin the Board's proceedings.

III

Turning to the merits, Exemption 5, which is relied upon by the defendant, covers "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §522(b) (5). According to the Board, the scope of this exemption is parallel to that of the privilege doctrine in the civil discovery context. Thus, it claims, the material in question here is not subject to disclosure as it falls within the purview of the "government's executive privilege," see E.P.A. v. Mink, 410 U.S. 73, 86 (1973), and the

"attorney work-product privilege", Hickman v. Taylor, 329 U.S. 495 (1947).

Defendant's contentions are supported by broad language in the recent decision of N. L. R. B. v. Sears, Roebuck & Co., 421 U.S. 132 (1975). There, the Court was concerned with certain memoranda prepared by the Office of the General Counsel of the N. L. R. B. explaining decisions of that agency to file or not to file a complaint after unfair labor practice charges had been lodged with the Board by a union or employer. The Court held that decisions not to file a complaint were "final opinions" and therefore not exempt under Exemption 5 of the Act. On the other hand, decisions to file a complaint only commenced the litigation process and were exempt.

In the course of its decision, the Court took the opportunity to review much of the background and policy of Exemption 5. The Court noted that:

> Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency. E.P.A. v. Mink, 410 U.S. at 85-86. Since virtually any document not privileged may be discovered by the appropriate litigant, if it is relevant to his litigation; and since the Act clearly intended to give any member of the public as much right to disclosure as one with a special interest therein, . . . it is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context.

421 U.S. at 148-49 (citations omitted). More specifically, the Court wrote that "it is clear" "that Congress had the Government's executive privilege specifically in mind in adopting Exemption 5," Id. at 150 and "that it is equally clear that Congress had the attorney work-product privilege specifically in mind when it adopted (this) Exemption . . . ." Id. at 154.

This court does not believe that N. L. R. B. v. Sears is dispositive of the issue at hand. In Sears, as noted, the subject matter in question included memoranda designed to circulate among the various departments of the National Labor Relations Board. These memoranda clearly fell within the category envisioned by Congress through its use of the phrase "inter-agency or intra-agency memorandums or letters." The issue before the Court was the scope of the exemption accorded to this category of materials. Phrased in terms of the statute, the issue was the meaning of the second phrase of Exemption 5 - "which would not be available by law to a party other than an agency in litigation with the agency." It was for the purpose of this latter inquiry that the Court looked to the civil discovery rules as analogous guidance.

In the case at bar, however, the material requested consists solely of statements made in support of the Union's charges. See 29 C.F.R. §1014. This material does not fall within the scope of the "memorandums or letters" exemption of Exemption 5. Whatever broad language exists in Sears or other cases, e.g., E.P.A. v. Mink, supra, equating Exemption 5 to civil discovery privileges was enunciated in the context of "inter-agency or intra-agency memorandums or letters" or "memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy". Sears, supra at 154. This court does not believe that such statements should be applied to carry Exemption 5 to the type of witness statements in question here.

This decision is not based on a purely mechanical interpretation of the statutory language. The cases have uniformly held that Exemption 5 is not to be construed to include documents consisting essentially of factual material. As the Supreme Court wrote in E.P.A. v. Mink, supra at 89:

> [v]irtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other.

Or, as the District of Columbia Circuit has said, the exemption covers

> internal communications consisting of advice, recommendations, opinions, and other materials reflecting deliberative or policy-making processes, but not purely factual or investigatory reports.

Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971). See also Tennessean Newspapers, Inc. v. F.H.A., 464 F.2d 657, 660 (6th Cir. 1972); Bristol-Myers Co. v. F.T.C., 424 F.2d 935, 939 (D.C. Cir. 1970); Philadelphia Newspapers, Inc. v. Department of H.U.D., 343 F. Supp. 1176, 1178 (E.D. Pa. 1972); M.A. Schapiro & Co. v. S.E.C., 339 F. Supp. 467, 470 (D. D.C. 1972); Consumers Union of United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 803 (S.D. N.Y. 1969).

This distinction is firmly rooted in the legislative history and policy of the Freedom of Information Act. In explaining the exemption, the Senate Committee wrote that it was in response to comments which pointed out that "it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny." S. Rep. No. 813 on S. 1160, 89th Cong., 1st Sess., (1965). Similarly, the House Report considered the policy of the exemption as being to eliminate the inhibition of a free and frank exchange of opinions and recommendations among government personnel which could result from routine disclosure of their internal communications. H. R. Rep. No. 1497, 89th Cong., 2d Sess., at 10 (1966). See also Ackerley

v. Ley, 420 F. 2d 1336, 1341 (D.C. Cir. 1969). These considerations are not present in the instant situation.

Brockway v. Department of the Air Force, 518 F.2d 1184 (8th Cir. 1975) which disapproved of the emphasis on the deliberative nature of a document in determining the application of Exemption 5 to such a document does not require a contrary result. Brockway dealt with statements of Air Force personnel concerning an accident involving the Department's aircraft. In that case the statements, although factual in nature, were of use in the Department's future planning. Consequently, the Eighth Circuit held that:

> [o]n the narrow facts of this case we believe that the deliberative processes of the Air Force in establishing appropriate safety policies will be best protected by permitting these witness statements to be exempted from disclosure.

Id. at 1194.

For these reasons, this court holds that Exemption 5 does not cover the statements of witnesses taken by the Board in connection with the unfair labor practice charge against Title Guarantee.

IV

The defendant also relies on Exemptions 7(A), 7(C) and 7(D) which provide that the Act does not apply to "investigatory records compiled for law enforcement purposes to the extent that the production of such records would:

> (A) Interfere with enforcement proceedings . . .
>
> (C) constitute an unwarranted invasion of personal privacy, (or)
>
> (D) disclose the identity of a confidential source . . ."

5 U.S.C. §552(b) (7) (A), 7 (C), 7 (D).

In discussing the application of this exemption to the instant case, it will be helpful to review the history of the investigatory materials exemption. As originally enacted this provision exempted

> investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.

5 U.S.C. §552(b) (7) (1967). The legislative history of this broad language indicates - and plaintiff appears to concide this - that under the original version of Exemption 7, virtually any material compiled in the course of an investigation would be withheld from disclosure. H. R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). Thus, in Wellman Industries Inc. v. N. L. R. B., 490 F. 2d 427 (4th Cir. 1974), the Court held that affidavits obtained by an N. L. R. B. investigator during his inquiry into Union objections to a representation election were not discoverable under the Act as the Exemption was designed to "prevent premature discovery of an investigation so that the Board can present its strongest case . . ." Id. at 431 citing Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971.) See also Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D.P.R. 1970); Clement Bros. Inc. v. N. L. R. B., 282 F. Supp. 540 (N. D. Ga. 1968).

In 1974, however, the Act was amended, substantially changing the provisions of Exemption 7. Defendant, itself, concedes that the purpose of the amendments, as evidenced by the legislative history, was to limit the exemption to instances where disclosure would interfere with one of a specific set of interests. The amendment requires that the government "specify some harm in order to claim the exemption" and does not "afford . . . all law enforcement matters a blanket exemption." 120 Cong. Rec. H10868 (Remarks of Congressman Reed of New York) (daily ed. Nov. 20, 1974). In enacting the amended

exception, the Congress was concerned with the sweeping exemptions afforded by some court decisions, see e.g., Center for National Policy Review v. Weinberger, 502 F.2d 370 (D.C. Cir. 1974), and saw the amended exemption as narrowing the body of material which would be withheld. 120 Cong. Rec. S9331 (Remarks of Senator Kennedy) (daily ed. May 30, 1974). See also 120 Cong. Rec. S9330 (Remarks of Senator Hart) (daily ed. May 30, 1974).

In light of this history, and from the language of the amendment as well, it is clear that the courts must examine each situation individually and determine if any of the specific harms enumerated by the statute would result from disclosure. It the government does not satisfy its statutory burden of proof, 5 U.S.C. §552(a) (4)(B), that some such particular harm exists, the "general philosophy of full agency disclosure," N. L. R. B. v. Sears, Roebuck & Co., supra at 136, must prevail and the material be disclosed.

Defendant contends that disclosure of the material in question would "interfere with enforcement proceedings" by harming the Government's case in administrative and/or judicial proceedings, cutting off information from members of the public who would be reluctant to volunteer information if they knew their names or the information will be revealed, and stifling effective trial preparation which is protected by the attorney's work product privilege. The legislative history indicates, however, that these general contentions are insufficient under the amended exemption. The relevant explanation of this Exemption states that it:

> would apply whenever the Government's case in court - a concrete prospective law enforcement proceedings - would be harmed by the premature release of evidence or information not in the possession of known or potential

> defendants. This would apply also where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding. In determining whether or not the information to be released will interfere with a law enforcement proceeding it is only relevant to make such determination in the context of the particular enforcement proceeding.

120 Cong. Rec. S9329 (Remarks of Senator Hart) (daily ed. May 30, 1974). In this case, none of the specific types of interference has been shown. The Court has reviewed the material in question and concludes that release of the information would not block further information of the same type from similar sources nor would it stifle effective preparation of the case. In addition, it does not appear that the specific enforcement proceeding would be harmed. Whatever value Title Guarantee may gain from the information sought will not be based on the timing of such release but rather on its determination of whether any material contained in the released documents supports its contentions. This value is precisely that which is contemplated by the Freedom of Information Act and is not restricted by the exemptions to the Act. See N. L. R. B. v. Schill Steel Products, Inc., 408 F.2d 803, 805 (5th Cir. 1969).

Defendant's further contention that the documents would constitute an unwarranted invasion of personal privacy seems to hinge on a rather wide interpretation of Exemption 7(C). According to the defendant, the right to privacy here includes the "right to select the people to whom . . . (one) will communicate his ideas." The court does not agree. The cases applying Exemption 7(C) are generally concerned with items which are much more commonly thought of as private. See, e.g., Rural Housing Alliance

v. U.S. Department of Agriculture, 498 F.2d 73 (D.C. Cir. 1974) (information concerning marital status, legitimacy of children, identity of fathers of children, medical conditions, welfare payments, alcoholic consumption, family fights); Wine Hobby U.S.A. v. I.R.S., 502 F.2d 133 (3d Cir. 1974) (home address, family status); Ackerley v. Ley, 420 F.2d 1336 (D.C. Cir. 1969) (medical files); Ditlow v. Schultz, 379 F. Supp. 326 (D.D.C. 1974) (travel history). The court has examined the material in question and has found no personal matters which should be protected under Exemption 7(C).

With regard to defendant's final contention that disclosure would reveal the identity of a confidential source, the Court notes that the Conference Report accompanying the final version of the bill which created Exemption 7(D) states that the term "confidential source" was employed

> to make clear that the identity of a person . . . may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred.

S. Rep. No. 93-1200, 93d Cong., 2d Sess. 13 (1974). In the present situation, defendant has not presented any evidence that the material which is sought was elicited after an express assurance of confidentiality. In such a case, it is reasonable to infer that no such assurance was made, and, in any event, the burden of demonstrating such an assurance is on the government. 5 U.S.C. §552(a)(4)(B). Thus, the crucial inquiry is whether it is reasonable to infer that the statements were made under some understanding on the part of the deponent that his statements would be confidential. The court has reviewed the material and concludes that no such inference is reasonable. The nature of the material as well as the identity of the deponents indicates that an understanding of

confidentiality or lack of it would be entirely irrelevant to whether the information would have been offered to the Board.

Accordingly, the Board's motion to dismiss the complaint, or, in the alternative, for summary judgment, is denied. Plaintiff's motion for summary judgment is granted to the extent that the Board is directed to turn over the material sought by the plaintiff for inspection and copying forthwith. It appears that if the material is disclosed forthwith, Title Guarantee will have adequate time to review these documents prior to the scheduled hearings. The court finds that, unlike the renegotiation procedures in Bannercraft, the nature of an unfair labor practice proceeding is such that plaintiff will be irreparably harmed if the material is not disclosed prior to those hearings. Therefore, should the material not be made available to Title Guarantee in advance of the administrative hearings, the Board is enjoined from conducting any hearings in this matter until such time as it complies with this decision.

So Ordered.

s/ Lee P. Gagliardi
U.S.D.J.

Dated: New York, New York
October 10, 1975.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

THE TITLE GUARANTEE COMPANY

AND

CASE NO. 2-CA-13745

DISTRICT 65, WHOLESALE, RETAIL OFFICE AND PROCESSING UNION, DISTRIBUTIVE WORKERS OF AMERICA

ORDER POSTPONING HEARING

IT HEREBY IS ORDERED that the hearing in the above-entitled matter scheduled for October 14, 1975 at 11:00 a. m., at 26 Federal Plaza Room 3614, New York, New York be, and the same hereby is, postponed indefinitely.

Dated at New York, New York this 14th day of October 1975.

/s/ Sidney Danielson
Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

[Attorneys names omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE TITLE GUARANTEE COMPANY, a Subsidiary of PIONEER NATIONAL TITLE INSURANCE COMPANY, a Subsidiary of TITLE INSURANCE AND TRUST COMPANY, a Subsidiary of THE TI CORPORATION (OF CALIFORNIA), Plaintiff-Appellee,	
v.	Civil Action No. 75-3828
NATIONAL LABOR RELATIONS BOARD Defendant-Appellant.	

MOTION OF DEFENDANT-APPELLANT FOR STAY OF ORDER PENDING APPEAL

Defendant-Appellant National Labor Relations Board respectfully moves this Court to stay the order issued against it on October 10, 1975, pending appeal to the Court of Appeals for the Second Circuit. In support of this motion, defendant-appellant shows as follows:

1. On October 10, 1975, in Civil Action No. 75-3828, and pursuant to the Freedom of Information Act, 5 U.S.C. §552, as amended, 88 Stat. 1563, this Court entered an order directing the defendant-appellant to turn over the material sought by the plaintiff-appellee forthwith, and enjoining the defendant-appellant from conducting its unfair labor practice hearing pending compliance with its order.

2. On October 20, 1975, defendant-appellant filed a timely Notice of Appeal from that order, and the record on appeal is now being prepared for transmission to the United States Court of Appeals for the Second Circuit.

3. Defendant-appellant meets the standards for grant of a stay pending appeal in that (a) it is likely to prevail on the merits of its appeal; (b) it will suffer irreparable injury if a stay is not granted; (c) plaintiff-appellee will suffer no substantial harm as a result of the granting of a stay; and (d) the granting of a stay would service the public interest. See Associate Security Corp.

v. S.E.C., 283 F. 2d 773, 774-775 (C.A. 10, 1960); Adams v. Walker, 488 F. 2d 1064, 1065 (C.A. 7, 1973); Beverly v. United States, 468 F. 2d 732, 740-741 n. 13 (C.A. 5, 1972); Friends of Earth v. Armstrong, 360 F. Supp. 165, 195-196 (D.C. Utah, 1973). As shown below, all of those conditions exist in the present case, and accordingly the requested stay is appropriate and should be granted.

a. There is substantial likelihood that the Board will prevail upon the merits of the appeal. In the District Court, defendant-appellant contended that Board affidavits and statements were privileged from disclosure by Exemption 5 and 7(A), (C), and (D) of the Freedom of Information Act. Exemption 5 has been interpreted as embodying the "executive privilege" and the "attorney work product privilege." N. L. R. B. v. Sears, Roebuck & Co., 421 U.S. 132, 150-154 (1975). Where disclosure of documents would interfere with the consultative functions of government protected by the executive privilege or would constitute an invasion of the attorney's work product, they have been held privileged by Exemption 5. See N. L. R. B. v. Sears, Roebuck & Co., supra; Brockway v. Department of the Air Force, 518 F. 2d 1184 (1975). Thus, defendant-appellant is likely to prevail in its claim that the material sought is privileged from disclosure by Exemption 5. Exemption 7, as amended, protects "investigatory records compiled for law enforcement purposes" where their disclosure would

> (A) interfere with enforcement proceedings . . ., (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source . . . .

The circuit courts have uniformly held that Board affidavits are exempt from disclosure under the original Exemption 7. Wellman Industries, Inc. v. N. L. R. B., 490 F. 2d 427, 431 (C.A. 4, 1974); Clement Bros., Inc. v. N. L. R. B., 282 F. Supp. 540, 542 (D.C. N.D. Ga., 1968), approved, N. L. R. B. v. Clement Bros., Inc., 407 F. 2d 1027, 1031 (C.A. 5, 1969); Barceloneta Shoe Corp. v.

Compton, 271 F. Supp. 591, 593-594 (D. P.R., 1970), cited with approval, Bristol Myers v. F.T.C., 424 F. 2d 935, 939 (C.A.D.C., 1970), cert. denied, 400 U.S. 824. See also, Frankel v. S.E.C., 460 F. 2d 813 (C.A. 2, 1972). As the amended Exemption 7 was merely intended as a codification of the pre-existing caselaw interpreting that exemption (120 Cong. Rec. S9330) (daily ed., May 30, 1974), there is a strong likelihood that the defendant-appellant's claim under Exemption 7 will prevail in the Court of Appeals.

Regarding the District Court's enjoining of the Board's unfair labor practice hearing, the Supreme Court in Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), determined that district courts have no authority to interfere with Board proceedings. See also, Newport News Shipbuilding & Dry Dock Co. v. Schauffler, et al., 303 U.S. 54 (1938). The Freedom of Information Act does not alter this long established rule. Sears, Roebuck & Co. v. N.L.R.B., 473 F. 2d 91 (C.A.D.C., 1972), cert. denied, 415 U.S. 950; General Cigar Co., Inc. v. Nash, ___F. Supp. ___, 89 LRRM 2863 (D.C.D.C., 1975). See also, Renegotiation Board v. Bannercraft Clothing Co., Inc., et al., 415 U.S. 1 (1974). The District Court order therefore constitutes error and will likely be reversed by the Court of Appeals.

b. If a stay is not granted, the employees involved here, the affiants, and the public interest, which the Board represents, will suffer irreparable injury. Disclosure of the material sought in this case would interfere with the Board's ability to present its strongest case in the underlying unfair labor practice proceedings. Wellman Industries, Inc. v. N.L.R.B., supra, 490 F. 2d at 431. In addition, disclosure would seriously hinder the Board in its present and future investigations by indicating to individuals who constitute the Board's potential sources of information that information given in confidence will be routinely disclosable under the Freedom of Information Act. Disclosure would also compromise the privacy and confidentiality of information sources in the underlying unfair labor practice proceeding. If the District Court's order

enjoining the Board's hearing is not stayed the vindication of the employee rights and the public interest protected by the National Labor Relations Act will be delayed indefinitely. In the dispute underlying this action, the plaintiff-appellee is refusing to recognize District 65, Wholesale, Retail, Office and Processing Union, Distributive Workers of America as the collective-bargaining representative of its employees. Those employees are thereby being denied their rights under the National Labor Relations Act to be represented by a union and to engage in collective bargaining with their employer. It is clear that "[l]abor matters should proceed promptly". Magnesium Casting Co. v. Hoban, 401 F. 2d 516, 518 (C.A. 1, 1968). This is especially true where the representational rights of employees are at stake. In such cases, the Courts have refused to permit delay through judicial intervention other than that provided for in the National Labor Relations Act, itself. Boire v. Greyhound Corp., 376 U.S. 473, 477-479 (1963); Groendyke Transport, Inc. v. Davis, 406 F. 2d 1158, 1163 (C.A. 5, 1969). Finally, the delay occasioned by the District Court's injunction will seriously diminish the quality of the Board's hearing. By enacting the six-month limitations period in Section 10(b) of the National Labor Relations Act, Congress intended to prevent Board hearings from being conducted long after a violation was alleged to have occurred, "and after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." H. R. Rep. No. 245, 80th Cong. 1st Sess. p. 40.

c. Plaintiff-appellee would not be substantially harmed by a stay. If a stay is granted, the plaintiff-appellee will be required to participate in a Board hearing without prior access to the requested material. Moreover, to the extent individuals who gave affidavits testify at the hearing, the Board will produce their

statements at the hearing for cross-examination purposes. Finally, if it turns out that plaintiff-appellee is prejudicially harmed by the Board's failure to produce the material prior to the hearing, the United States Court of Appeals for the Second Circuit will provide appropriate relief pursuant to the statutory review procedures set forth in Section 10(e) and (f) of the National Labor Relations Act. See, Sears, Roebuck & Co. v. N. L. R. B., supra, 473 F. 2d at 91. See also, N. L. R. B. v. Interboro Contractors, Inc., 432 F. 2d 854 (C. A. 2, 1970), cert. denied, 402 U.S. 915.

d. The granting of a stay will serve the public interest. As noted above, the granting of a stay will allow the public interest protected by the National Labor Relations Act to be most expeditiously and efficiently vindicated. By filing a refusal to bargain charge with the Board, the Union in this case has sought an orderly resolution of its dispute with plaintiff-appellee. The Supreme Court has noted that a union, faced with undue delay before the Board, is often forced to call a strike to achieve recognition by its own economic power. Boire v. Greyhound Corp., supra, 376 U.S. at 478, quoting from H. R. Rep. No. 972, 74th Cong., 1st Sess., 5. Thus, the purpose of the National Labor Relations Act, namely the preservation of industrial peace, will best be effectuated by granting a stay.

4. In other Freedom of Information Act cases in which the Board has appealed adverse District Court orders, the Courts have held that stay of the order was appropriate pending resolution of the issues by the Court of Appeals. See Sears, Roebuck & Co. v. N. L. R. B., ___F. Supp. ___, 81 LRRM 2676 (D. C. D. C., 1972); Kent Corporation v. N. L. R. B., et al. (C. A. 5), Docket No. 74-1710, stay pending appeal granted by unreported order of May 2, 1974; Getman v. N. L. R. B., 450 F. 2d 670, 672 n. 4 (C. A. D. C., 1971).

WHEREFORE, for the reasons stated above, appellants respectfully request the Court to grant a stay of its order pending the Circuit Court's resolution of the issue on appeal.

Respectfully submitted,

Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board

Dated at Washington, D. C. this 20th day of October, 1975.

By /s/ Abigail Cooley

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[Caption omitted in printing]

PLAINTIFF-APPELLEE'S MEMORANDUM IN OPPOSITION TO MOTION OF NATIONAL LABOR RELATIONS BOARD FOR STAY OF ORDER PENDING APPEAL

Plaintiff-Appellee, THE TITLE GUARANTEE COMPANY, etc. (hereinafter "Title Guarantee" or "the Company"), submits this memorandum in opposition to the motion of the Defendant-Appellant, NATIONAL LABOR RELATIONS BOARD (hereinafter "the Board" or "N. L. R. B."), for a stay of this Court's Order entered on October 10, 1975, in the above matter.

STATEMENT OF THE CASE

As more fully described in the Court's Opinion, this case arose out of Title Guarantee's attempts to obtain, prior to a Board administrative hearing, certain statements received by N. L. R. B. agents during the investigation of an unfair labor practice charge against the Company. Slip opinion at 2-4. Ultimately, the Company filed an action under the Freedom of Information Act, as amended (hereinafter "the Act" or "F. O. I. A."). 5 U.S.C. §552 (a)(4)(B) (1974). Id.

The Board defended its withholding on the grounds that the statements sought were exempt from disclosure under certain specified exemptions to the Act, [1] and moved to dismiss the complaint, or in the alternative, for summary judgment. Title Guarantee cross-moved for summary judgment in its favor. Following oral argument on the respective motions, [2] the Court directed

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1/ 5 U.S.C. §552 (b)(5), 7(A), (C), (D).

2/ A stenographic transcript was made of the argument. References thereto are indicated by the designation "Tr.," followed by a page number. The Board did not call any witnesses or offer other documentary proof in support of its claims to exemption. (Tr. 2-3). Nor was its motion supported by any affidavits. Under the Act, the Board has the burden "to sustain its action" in withholding. 5 U.S.C. §552 (a)(4)(B).

that the subject statements be submitted for an in camera inspection. [3]

On October 10, 1975, the Court issued its Opinion and the Order from which the Board appeals. [4] Rejecting each of the arguments against disclosure, the Court denied the Board's motion. It granted the Company's cross-motion "to the extent that the Board is directed to turn over the material sought by the plaintiff for inspection and copying forthwith." Slip opinion, at 17. The Court further concluded that, while immediate compliance with its Order would adequately meet the needs of Title Guarantee with respect to the administrative hearings, "the nature of an unfair labor practice hearing is such that plaintiff will be irreparably harmed if the material is not disclosed prior to those hearings." Id. Accordingly, it ordered that:

> " . . . should the material not be made available to Title Guarantee in advance of the administrative hearings, the Board is enjoined from conducting any hearings in this matter until such time as it complies with this decision."

Id.

The Board refused to comply with this disclosure mandate. Instead, it postponed its unfair labor practice hearing sine die, [5] and appealed. The instant motion seeks to stay this Court's Order pending appeal. Title Guarantee opposes the motion.

3/ Such a procedure is specifically authorized by the Act. 5 U.S.C. §552 (a) (4) (B).

4/ The parties were notified orally of the Court's determination on October 8. The Board's Notice of Appeal is dated October 20, 1975.

5/ Attached as Exhibit A.

THE ISSUE

Whether the N. L. R. B. has failed to demonstrate that it is entitled to a stay pending appeal under applicable criteria.

The Company maintains that this question should be answered in the affirmative.

ARGUMENT

POINT I

UNDER THE DISPARATE STANDARDS FOR MANDATORY AND PROHIBITORY INJUNCTIONS, THE INJUNCTION AGAINST PROCEEDINGS SHOULD NOT BE STAYED

The stay which the Board seeks is directed towards two distinct, but interrelated aspects of this Court's Order. The first is a mandatory injunction, which directs the Board to produce the statements forthwith for inspection and copying by Title Guarantee. The second is a prohibitory injunction, which forbids the Board from conducting an unfair labor practice hearing involving Title Guarantee until it produces those statements.

With respect to the first aspect, the four-factor test suggested by the Board for determining whether a stay is appropriate appears to be generally accepted (Motion, at 2). These factors include:

(1) the likelihood that the petitioner will prevail on the merits of the appeal;

(2) Irreparable injury to the petitioner unless the stay is granted;

(3) no substantial harm to other interested persons; and,

(4) no harm to the public interest.

7 Moore's Federal Practice, ¶62.05 (at pp. 62-24-25) (2d ed. 1975), citing Belcher v. Birmingham Trust Nat'l Bank, 395 F.2d

685 (5th Cir. 1968). Unlike the Board, we cannot conclude in the circumstances of this case that the application of this test warrants a stay of the disclosure mandate. Our reasons are discussed in Point II, infra.

With respect to the second aspect of the Court's Order, however, -- the injunction against Board proceedings -- different considerations apply. Thus,

> "When the injunction is prohibitory, the problem as to whether irreparable harm will result from postponement of relief until full consideration can be had has generally already been resolved in a petition for a temporary injunction. If such relief has been granted, it is an unusual case indeed in which an injunction granted to preserve the status quo, and vindicated on plenary trial, would be dissolved pending appeal. This is true because the very basis for the grant of the temporary injunction was the fact that irreparable injury might result from permitting a change in the relationship of the parties prior to a final determination on the merits. The temporary injunction having been made permanent, it would surely be a remarkable case in which the party enjoined would be at that point relieved of the restraint pending appeal."

7 Moore's Federal Practice, id., at pp. 62-25-26.

In the instant matter, the Court has concluded that Title Guarantee would be irreparably harmed if the Board were permitted to conduct its hearing without Title Guarantee first having obtained the statements sought. Slip opinion, at 17. To now relieve the Board of the prohibitory mandate pending appeal would rob the Court's decision of all practical significance. The Board would proceed with its administrative hearing, without producing the witness statements in advance, while pursuing its appeal in the courts. The harm would be manifest.

It should be noted that the Board would not be unduly disadvantaged by denial of such a stay. Board Counsel has advised counsel for Title Guarantee that it would probably pursue any appeal in this matter by requesting "summary reversal." Such a procedure would apparently dispense with the formalities of printed briefs and appendices. It is one seemingly authorized by the F.O.I.A., 6/ as well as the Federal Rules of Appellate Procedure, 7/ and the Second Circuit's own rules. 8/ Moreover, the Board has unilaterally adjourned the hearing without date. It apparently considers the issues raised in this case as important ones. We agree. The issues should be considered with deliberate speed upon review of the entire case, and not pretermitted on a procedural motion. There may be some delay occasioned by this appeal, but is is excusable delay, and will be brief by Board standards. 9/ The stay of the prohibitory injunction should be denied.

6/ 5 U.S.C. §552(a)(4)(D); S. Rep. No. 93-854, 93d Cong., 2d Sess., at 13 (1974); see, Seafarers Int'l Union v. Baldovin, 508 F. 2d 125, 88 L.R.R.M. 2902, 2903 n. 1, vacated as moot, 511 F. 2d 1161, 89 L.R.R.M. 2320 (5th Cir. 1975).

7/ F.R.App. P. Rules 2, 11(d); see, 9 Moore's Federal Practice, ¶¶202.01, et seq. (at p. 601), 211.11 (at p. 1823) (2d ed. 1975).

8/ Second Circuit Rules, §§ 27(a), (d), (g); 34(a)

9/ If the Board were as concerned with the effects of delay as it now asserts (Motion, at 4-6), it might have sought an injunction against the alleged unfair labor practice as soon as it issued a complaint. §10(j), L.M.R.A., 29 U.S.C. §160(j). See, N.L.R.B. Casehandling Manual (Vol. I), §10310.2 (1975) ("Guidelines for the Utilization of Section 10(j)"); see also, N.L.R.B. v. Seeler's Trading Port, ___F.2d ___, 90 L.R.R.M. ___ (2d Cir. 1975). While we are not suggesting that this is an injunction the Board should be able to circumvent the F.O.I.A., the fact that the Board did not try to obtain this statutory remedy makes us view the Board's argument with a jaundiced eye. Cf. Humphrey v. Retired Persons Pharmacy, ___ L.R.R.M. ___ (D.D.C. 1973).
Contrary to the Board's assertion (Motion, at 5), §10(b) of the L.M.R.A., 29 U.S.C. §160(b), was not intended to hasten (Cont'd)

POINT II

THE BOARD HAS FAILED TO JUSTIFY A STAY OF THE COURT'S MANDATORY INJUNCTION REQUIRING PRODUCTION OF THE WITNESS STATEMENTS.

The Board argues that under the four-part test for staying mandatory injunctions, supra, p. 5, the Court should suspend operation of its Order requiring production of the investigative statements pending appeal. Not surprisingly, its contentions are substantially the same as those raised earlier on the merits of withholding. They were rejected then, and should be rejected now.

A. The Board Has Not Shown A Substantial Likelihood That It Will Prevail Upon The Merits Of The Appeal.

The Board's first arguments repeat the agency's previous contentions that the statements sought by Title Guarantee are exempt under Exemption 5, and portions of Exemption 7, of the Amended Act. 10/ (Motion, at 2-4). We deal with these in order.

9/ (Continued) Board hearings, but to protect respondents by requiring that unfair labor practice charges be filed within 6 months after the alleged violation occurred. See, Burnett v. N.Y. Central Railroad Co., 380 U.S. 424, (1965). It is certainly not authority for allowing the Board to ignore the F.O.I.A.
With respect to the Board's argument that labor matters should proceed promptly, "especially . . . where representational rights of employees are concerned" (Motion, at 5), the N.L.R.B. fails to reconcile its lofty principles with its actions in this case. When Title Guarantee initially sought to test the union's majority status by filing a representation petition, the Board summarily dismissed it. Representation proceedings are far speedier for resolving questions of union support than unfair labor practice cases.

10/ 5 U.S.C. §552(b)(5), (7)(A) (C) (D).

1. Exemption 5

The Board renews its claim that Exemption 5 embodies the "executive privilege" and the "attorney work product privilege," and, therefore, the statements are exempt.

This Court discussed at length the merits of this contention, including the cases cited again by the Board. Slip opinion, at 6-11. [11/] It properly concluded that, whatever the scope of the second clause of Exemption 5, [12/] the Board had failed to show that the statements constituted "memoranda or letters" within the meaning of the Exemption; in fact, it said, they were not. Id., at 8-9. The Court emphasized that the materials in question did not reflect "deliberative or policy making processes" of government officials, but were rather documents of "purely factual, investigative matters . . . ." Id., at 9, citing Environmental Protection Agency v. Mink, 410 U.S. 73 (1973), and other cases. It found that the legislative history of Exemption 5 revealed an intention to protect only the former, and in view of the nature of the statements, the exemption was inapplicable in this case. Id. Finally, the Court properly distinguished the holding in Brockway, supra, on "the narrow facts" presented there, as the Eighth Circuit intended. Id., at 11; 518 F. 2d at 1194. For these reasons, the Court rejected the Board's argument based on Exemption 5.

The Board has presented no reason to suggest that the Court's decision was improper, or even open to serious dispute. It therefore has failed to show a substantial likelihood of success on appeal on this issue.

11/ N. L. R. B. v. Sears, Roebuck & Co., 421 U.S. 132, 150-154 (1975); Brockway v. Department of the Air Force, 518 F. 2d 1184 (1975).

12/ " . . . which would not be available by law to a party other than an agency in litigation with the agency;: 5 U.S.C. §552 (b)(5).

2. Exemption 7

Arguing that amended Exemption 7 [13/] "was merely intended as a codification of the preexisting caselaw [favorable to the Board] interpreting that exemption," the Board maintains that there is a strong likelihood it will prevail on appeal (Motion, at 3).

The Court, however, after reviewing the recent legislative history, recognized that under the amended exemption "the courts must examine each situation individually and determine if any of the specific harms enumerated by the statute would result from disclosure." Slip opinion, at 13. It also observed the government has the statutory burden of proof in establishing the existence of such harms. Id.; 5 U.S.C. §552(a)(4)(B).

Here, the Board failed to meet that burden. It did not establish that the statements sought fell within the narrow confines of clauses (a), (C), or (D). With respect to clause (A), the Board failed to show that "premature release" of the statements would harm its case (really General Counsel's case) in the administrative hearing or impede any investigation. Slip opinion, at 14-15. As to clause (C), the Court observed, as we had suspected, that the statements did not deal with matters traditionally regarded as "private". Id., at 15; see, Getman v. N.L.R.B. 450 F. 2d 670, 73 L.R.R.M. 2101, 2104 (D.C. Cir. 1971) (matters containing "intimate details' of a 'highly personal nature"). The Board's final contention, under Exemption 7(D), that disclosure would reveal

13/ 5 U.S.C. §552(b)(7) now exempts "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would:
(a) interfere with enforcement proceedings; * * *
(c) constitute an unwarranted invasion of personal privacy [or]
(d) disclose the identity of a confidential source . . . ***

the identity of a confidential source, was also rejected. There was no proof that the persons interviewed had in fact been offered confidentiality, and the Court found it unreasonable to suppose that the deponents understood the statements would be kept confidential. Slip opinion, at 16-17.

There is no substantial basis for believing that this Court erred and that the Court of Appeals will reverse. First, the Court rendered its decision only after personally viewing the statements in an in camera inspection. It therefore had an opportunity to carefully examine the disputed documents in light of the applicable law and the parties contentions. Second, the Board introduced no evidence relevant to its position "in the context of the particular enforcement proceeding." 120 Cong. Rec. S9329 (Remarks of Sen. Hart) (daily ed. May 30, 1974), quoted in Slip opinion, at 14. The thrust of the 1974 amendments is to make F.O.I.A. proceedings evidentiary, as well as legal, in character where the government claims an exemption. The amendments are intended to focus inquiry on the actual harm reasonably anticipated from disclosure, in a particular proceeding. The Board's ipse dixit will no longer suffice. Third, the Board's contention that amended Exemption 7 was "merely intended as a codification of preexisting caselaw" is plainly incorrect. Indeed. the amendment resulted because Congress was dissatisfied with preexisting caselaw. No longer may the Government deny disclosure mechanically by reference to self-serving administrative regulations.

For these reasons, there is little, if any, likelihood that the Board will prevail on the merits of the appeal.[14/]

14/ The Board also argues in this section that the Court erroneously enjoined its unfair labor practice proceedings. On the contrary, the Court correctly distinguished the facts in Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1 (1974), from the instant matter. Therefore, the injunction against Board proceedings was proper. See Point I, supra.

B. The Board Has Failed To Show That It Would Suffer Irreparable Harm In The Absence Of A Stay.

The Board relies on the same tired arguments as the Court previously rejected to justify a stay of the disclosure mandate. Thus, it maintains that disclosure would interfere with the Board's ability to present its strongest case in the unfair labor practice hearing, and hinder present and future investigations (Motion, at 4).

The former assertion has been discussed in connection with Exemption 7.

With respect to the latter claim concerning the alleged danger to investigations from disclosure, other cases will have to be judged on their own facts. Here, it appears the Court properly took into account: the identity of the Charging Party; the private interest of the Charging Party in successfully prosecuting the case; the identity of the deponents; their relationship to the charging party and the respondent; the Board's published requirements for supporting unfair labor practice charges with evidence and other published investigative techniques; 15/ the apparent ease or difficulty with which the Board obtained the statements here in issue; the identity of the respondent and its bargaining history under the L. M. R. A. : the nature of the charges as reflecting on the confidential quality of the information contained in the statements; the nature of the charges as reflecting a propensity on the part of the respondent to retaliate, or lack of it; the status of proceedings before the Board; and, the relationship of the case under consideration to others pending before the Board or imminent. Considering all of these factors, the Court could find nothing which would suggest

15/ N. L. R. B. Casehandling Manual (Vol. I) §§10056.1-2, 10058 (1975).

that any investigations - present or future - would be hindered by disclosure in this case. Neither could we.

POINT III

THE BOARD'S REFUSAL TO DISCLOSE SHOULD BE ACCOMPANIED BY A STAY OF BOARD PROCEEDINGS.

The Board argues that a stay of this Court's order of disclosure should be granted to enable the Board to appeal (Motion, at 6). While we can appreciate the Board's concern, we are chagrined by the Board's opposition to a stay of its own proceedings, which would enable Title Guarantee to meaningfully participate in that appeal. If the Board's proceedings are permitted to go forward at this juncture, the District Court's decision will have been rendered a hollow victory. Fairness requires that the status quo be maintained pending appeal.

What the Board seeks here is a situation where the affidavit issue will become moot and the Company's opposition to the appeal academic.

If the hearing is permitted to take place without aid of the statements, the Company will have been deprived its incentive to sustain its position on appeal.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the Board's motion for a stay of this Court's order pending appeal should be denied.

Dated: October 28, 1975

Respectfully submitted,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
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By: /s/ Roger S. Kaplan
ATTORNEYS FOR PLAINTIFF-APPELLATE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE TITLE GUARANTEE COMPANY, a Subsidiary of PIONEER NATIONAL TITLE INSURANCE COMPANY, a Subsidiary of TITLE INSURANCE AND TRUST COMPANY, a Subsidiary of THE TI CORPORATION (OF CALIFORNIA),

Plaintiff,

-against -

NATIONAL LABOR RELATIONS BOARD,

Defendant.

[Appearances omitted in printing]

OPINION

GAGLIARDI, D. J.

The National Labor Relations Board (N. L. R. B. " or the "Board") has moved pursuant to Fed. R. Civ. P. 62(c) for a stay of the order of this court issued on October 10, 1975 directing the N. L. R. B. to turn over forthwith, pursuant to the Freedom of Information Act, as amended ("the Act"), 5. U. S. C. §552, certain material sought by the plaintiff, and enjoining the Board from conducting an unfair labor practice hearing pending compliance with that order. The N. L. R. B. has not complied with this court's order.

In support of its motion, the N. L. R. B. contends that: 1) it is likely to prevail on the merits of its appeal of this court's order; 2) it will suffer irreparable injury if a stay is not granted; 3) plaintiff will suffer no substantial harm as a result of the granting of a stay; and 4) a stay would serve the public interest.

With regard to the merits of the case, the N. L. R. B. contends - as it did in its original opposition to the relief sought by the plaintiff - that the material in question is exempt from disclosure under Exemptions 5 and 7 of the Act, 5. U. S. C. §552 (b)(5), (7), and that this court is without power to enjoin the Board's proceedings pending compliance with this court's order. Specifically, the N. L. R. B. reasserts that N. L. R. B. v. Sears, Roebuck & Co., 421 U. S. 132 (1975), and Brockway v. Department of the Air Force, 518 F. 2d 1184 (8th Cir. 1975), stand for the proposition that the material is not subject to dis-

closure under Exemption 5. It also claims that Wellman Industries, Inc. v. N. L. R. B., 490 F. 2d 427 (4th Cir. 1974), and several cases in districts outside of this Circuit are authority for the proposition that affidavits obtained in connection with unfair labor proceedings are exempt from disclosure under Exemption 7. Finally, the N. L. R. B. contends that under the doctrine of exhaustion of administrative remedies, Myers V. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), as applied to Freedom of Information Act cases, Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1 (1974); Sears, Roebuck & Co. v. N. L. R. B., 473 F. 2d 91 (D. C. Cir. 1972), cert. denied, 415 U.S. 950 (1974), this court is without power to enjoin the Board's proceedings pending complaince with the court's order.

Each of these contentions has been dealt with fully in the original opinion ordering disclosure of the material in question and will be reviewed only briefly.

For the reasons stated in the original opinion the court adheres to its decision that the material in question is not exempt from disclosure under the Act. N. L. R. B. v. Sears, supra, dealt with materials which reflected "deliberative or policy-making processes." E. P. A. v. Mink, 410 U.S. 73, 89 (1973); Soucie v. David, 448 F. 2d 1067, 1077 (D. C. Cir. 1971), and as such, these materials were covered by Exemption 5. Brockway v. Air Force, supra, similarly was limited to a case where "the deliberative processes of the Air Force. . . (would be) best protected by permitting. . . (the material sought) to be exempted from disclosure." Id. at 1194. In this case, plaintiff is seeking disclosure of purely factual materials which are not covered by Exemption 5. E. P. A. v. Mink, supra.

The cases relied upon by the defendant is connection with Exemption 7 were all decided prior to the recent amendments of the Act and are simply not in point. The amended Exemption 7, rather than representing the codification of the pre-amendment case law - as the Board contends - was the result of Congressional dissatisfaction with the application of the Act, 120 Cong. Rec. H10868 (Nov. 20, 1974); 120 Cong. Rec. S9330-31 (May 30, 1974), and was designed to narrow

the exemption. Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 8 (1975). Exemption 7 as it currently stands requires that material be disclosed unless it can be shown that one of a specific set of harms would result from disclosure.[1] The court has conducted in camera examination of the material in question and has determined that none of these harms would be forthcoming from disclosure of the specific materials at issue here. Moreover, the N. L. R. B. has clearly not satisfied its statutory burden of proof, 5 U. S. C. §552(a) (4) (B), in this regard.

With respect to the injunctive powers of this court, the court adheres to its original decision that "there is jurisdiction to enjoin agency proceedings pending resolution of a Freedom of Information claim." Sears, Roebuck & Co. v. N. L. R. B., supra at 93. The doctrine of exhaustion of administrative remedies, Myers v. Bethlehem Shipbuilding Corp., supra, applies where "the administrative remedy is as likely as the judicial remedy to provide the wanted relief." K. C. Davis, Administrative Law §20.01 at 56 (1958). "No court requires exhaustion where exhaustion will involve irreparable injury." Id. Here, the plaintiff has exhausted the available administrative channels and has been denied access to the requested material.[2] If the unfair labor proceeding continues and plaintiff does not prevail in that matter because of a lack of opportunity to adequately prepare, it is hardly likely that any judicial review would ever undo the harm.

Moreoever, in the present case the court has determined after in camera inspection that plaintiff would not require a substantial period of time to review the material and adequately prepare for the Board proceedings. Had the N. L. R. B. complied with this court's original order there would have been no need for a postponement of the Board proceedings. The N. L. R. B. has chosen, however, not to comply with the disclosure order and seeks to continue its administrative proceeding without giving the plaintiff the benefit of review of material which this court has determined it is entitled to under the Act. "With the express vesting of equitable jurisdiction in the district court by . . . (the Act), "Renegotiation

Board v. Bannercraft Clothing Co., supra at 20, this court will utilize its inherent powers as an equity court, cf., id., to bar such obviously inequitable procedures.

The defendant relies on Renegotiation Board v. Bannercraft, supra, for the proposition that injunctions against administrative proceedings pending ultimate resolution of Freedom of Information Act controversies will not be issued.[3] In truth, Bannercraft supports the issuance of an injunction in the instant case. Bannercraft was specifically limited by the Court to negotiation situations where discussions could reasonably continue while an action was pending in litigation. 415 U.S. at 20. Here, however, unlike Bannercraft, plaintiff is threatened with an impending unfair labor proceeding. De novo review of such a proceeding is unavailable. 29 U.S.C. §10(e), 160 (e); Universal Camera Co. v. N.L.R.B., 340 U.S. 474, 488 (1951). Compare 5 U.S.C. Sup. §1218; Renegotiation Board v. Bannercraft, supra. at 23 (de novo review available from Renegotiation Board decision). To deny plaintiff the opportunity to review the requested material prior to the hearing might effectively foreclose any value in the disclosure ordered by this court. This is precisely the type of situation in which Bannercraft implies that injunctive relief would be proper and in which the district courts have granted such relief. Cessna Aircraft Co. v. N.L.R.B., No. 75-111-C6 (D. Kan., October 28, 1975).

The curious aspect of defendant's present motion is that the Board itself has asserted that the exemptions go the Act parallel the discovery rules in the civil litigation context. The defendant cannot, then, reverse itself and claim that "discovery" of the material in question should be made subsequent to the completion of an administrative hearing. Title Guarantee has sought this material in the discovery context for the purpose of preparation for an unfair labor proceeding.[4] While it is clear that the rights accorded under the Act are not limited to litigants in an adversary proceeding, N.L.R.B. v.

Sears, Roebuck & Co., supra at 149, it is equally clear that the fact that a plaintiff is in an adversary position should not compromise his rights under the Act. See S. Rep. No. 813, 85th Cong., 1st Sess. at 7. This court has determined that disclosure is required and the court believes that if the policy of the Act is to have any real value, the plaintiff is entitled to his discovery prior to the administrative action.

The Board's other contentions can be dealt with summarily. For the reasons stated herein and in the original opinion this court believes that plaintiff will suffer irreparable harm if a stay of this court's order is granted. On the other hand, defendant has not demonstrated any harm in delaying the administrative proceeding until appellate review of the Freedom of Information claim is completed.

With regard to the public interest question, it is well-established that the Freedom of Information Act was enacted in order to ensure a "general philosophy of full disclosure," N. L. R. B. v. Sears, Roebuck & Co. supra at 136, which would "secure. . . information from possibly unwilling official hands." E. P. A. v. Mink, supra at 80. The Board, by its present motion, is seeking to enjoy the fruits of an unfair labor proceeding while refusing to comply with this court's order and to effectuate the "broadly conceived. . . public right," id., accorded by the Act. If the N. L. R. B. 's proceedings were to continue without disclosure of the material in question, not only the teeth but the very breath of the act would be taken out.

Accordingly, defendant's motion for a stay of this court's order dated October 10, 1975 directing defendants to make available forthwith the material sought by the plaintiff and enjoining the N. L. R. B. proceedings should the Board choose not to disclose the material requested by the plaintiffs is denied.

So Ordered.

/s/ Lee P. Gagliardi
U.S.D.J.

Dated: New York, New York
November 28, 1975

FOOTNOTES

1. Once it is determined that a request pertains to "investigatory records compiled for law enforcement purposes," the next question is whether release of the material would involve one of the six types of harm specified in clauses (A) through (F) of amended exemption 7. If not, the material must be released despite its character as an investigatory record compiled for law enforcement purposes, and (generally speaking) even when the requester is currently involved in civil or criminal proceedings with the Government.

Attorney General's Memorandum, supra at 6-7.

2. Indeed, the Acting Chief Administrative Law Judge of the N. L. R. B. wrote in his order denying disclosure:

> If [illegible] exhausted . . . (the Board's own Freedom of [illegible] Act procedures, 29 C. F. R. §102. 17, Title Guarantee) is of the opinion that the statements referred to in its Notice to Produce have been improperly withheld by the Board's General Counsel under the Freedom of Information Act, its recourse under that Act is to an appropriate United States District Court, as provided for in U. S. C. 552(a)(3) . . . .

Title Guarantee Company and District 65, No. 2-CA-13745, N. L. R. B. Division of Judges (D. C. September 9, 1975) at 2.

3. Bannercraft and all of the other cases cited by the parties and discussed herein deal with the question of preliminary injunctive relief pending resolution of Freedom of Information claims. Here, this court has determined that plaintiff is entitled to summary judgment on the merits and the equitable considerations weigh commensurately more heavily in plaintiff's favor.

4. The need for improved discovery procedures in connection with unfair labor practice proceedings has recently been underscored by a report of the New York County Lawyer's Association. N. Y. L. J., Nov. 19, 1975, p. 1, col. 2; p. 2, col. 5.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

THE TITLE GUARANTEE COMPANY,

and

Case No. 2-CA-13745

DISTRICT 65, WHOLESALE, RETAIL, OFFICE & PROCESSING UNION, DISTRIBUTIVE WORKERS OF AMERICA

ORDER

Respondent having filed a motion for "an Order of the Chief Administrative Law Judge pursuant to the Federal Rules of Civil Procedure, Rule 34(a), 29 CFR §102.24, and the Freedom of Information Act, as amended, 5 U.S.C. §552(a), compelling the Regional Director of [the Board] to permit discovery by complying with a Notice to Produce certain statements [described in such notice]"; Counsel for the General Counsel having filed an Opposition to the said motion; and the motion having been duly referred to the undersigned for disposition; now, after consideration,

IT IS ORDERED that Respondent's aforesaid motion be, and the same hereby is, denied. The Federal Rules of Civil Procedure relating to pre-trial discovery are inapplicable to Board's unfair labor practice proceedings. See, e.g., N.L.R.B. v. Interboro Contractors, 432 F. 2d 855, (C.A. 2), cert. den. 402 U.S. 915. Under Section 102.118 of the Board's Rules and Regulations, an administrative law judge is precluded from directing the production by a Regional Director of statements of the kind called for in Respondent's Notice to Produce, save under the conditions prescribed in that section, conditions which have not been met to date. An administrative law judge is without authority under the Board's Rules and Regulations to require compliance with the provisions of the Freedom of Information Act. The appropriate pro-

cedure for requesting Board materials and documents that are made available, or that it is claimed should be made available, for public inspection and copying under the Freedom of Information Act is specified in Section 102.117 of the Board's Rules and Regulations. If, having exhausted such procedures, Respondent is of the opinion that the statements referred to in its Notice to Produce have been improperly withheld by the Board's General Counsel under the Freedom of Information Act, its recourse under that Act is to an appropriate United States District Court, as provided for in 5 U.S.C. 552(a)(3), and not to the Chief Administrative Law Judge, or his designee. Where access to statements in the possession and control of the General Counsel is sought under the Freedom of Information Act, the determination [illegible] by the General Counsel under that Act is not subject to de [illegible] review by the Board, or an administrative law judge, in a proceeding instituted under Section 10(b) of the National Labor Relations Act.

/s/ Arthur Leff
Administrative Law Judge

Dated: September 9, 1975

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE TITLE GUARANTEE COMPANY, a Subsidiary of PIONEER NATIONAL TITLE INSURANCE COMPANY, a Subsidiary of TITLE INSURANCE AND TRUST COMPANY, a Sugisidary of THE TI CORPORATION (OFD CALIFORNIA),

Plaintiff-Appellee

v.

No. 75-6119

NATIONAL LABOR RELATIONS BOARD,

Defendant, Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have served by hand (by mail) two copies of the APPENDIX in the above-entitled case, on the following counsel of record, this 31st day of December 1975.

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Subscribed and Sworn to before me this